Supreme Court, U.S.
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No. 01-011617

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In The

Supreme Court of the United States

EARL ATWOOD, in his official capacity as Director, Wyoming Department of Revenue, and SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Petitioners,

vs.

BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the abrogation of Eleventh Amendment immunity in the Railroad Revitalization and Regulatory Reform Act a valid exercise of Congressional power to enforce the Fourteenth Amendment?

THE PARTIES

Petitioners are the Director of the Wyoming Department of Revenue and the Director of the Wyoming Department of Transportation.

At the time that these suits were initiated, the Director of the Wyoming Department of Revenue was R.M. "Johnnie" Burton. After the U.S. Court of Appeals for the Tenth Circuit issued its decision, Earl Atwood was appointed to succeed R.M. "Johnnie" Burton as Director of the Wyoming Department of Revenue. Accordingly, Mr. Atwood was automatically substituted for the previous Director of the Wyoming Department of Revenue, Ms. Burton, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Joint Motion For Stay and Consent Injunction filed in the U.S. District Court for the District of Wyoming on April 3, 2002, at p. 2 n. 1. Accordingly, Mr. Atwood is automatically substituted for Ms. Burton in this Court. Rule 35.3 of the Rules of the Supreme Court of the United States.

At all times during the pendency of these cases, the Director of the Wyoming Department of Transportation has been and is Sleeter Dover.

Respondents are Plaintiffs Burlington Northern and Santa Fe Railway Company, Union Pacific Railroad Company, and Intervenor United States of America.

STATEMENT PURSUANT TO RULE 29.6

Petitioners have been sued in their official capacity and are therefore government entities, and pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, no corporate disclosure statement is required.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order Denying Defendants' Motions to Dismiss entered by the United States District Court for the District of Wyoming is unreported and is included in the Appendix to the Petition.

The order and judgment entered by the United States Court of Appeals for the Tenth Circuit is reported at 270 F.3d 942 (10th Cir. 2001) and is included in the Appendix to this Petition.

The order of the United States Court of Appeals for the Tenth Circuit denying Petitioners' petition for rehearing is unreported and is included in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The order and judgment of the Court of Appeals was entered on October 24, 2001. The date of the order of the Court of Appeals denying Petitioners' motion for rehearing is January 31, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES INVOLVED

This petition involves the Commerce Clause of Section 8 of Article I, the Eleventh Amendment, and Sections 1 and 5 of the Fourteenth Amendment to the United

States Constitution. It also involves the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. §§ 10101, 11501. Finally, it involves the Wyoming Statutes on the Coal Transportation Tax and the Tax on Railroads. W.S. § 39-21-101 *et seq.*; W.S. § 39-20-101 *et seq.* Copies of each of these Constitutional provisions and statutes are supplied in the Appendix to this Petition.

STATEMENT OF THE CASE

The Railroad Revitalization and Regulatory Reform Act (4-R Act) creates a legal cause of action against States that discriminate against railroads in taxation. The Fourteenth Amendment does not prohibit States from discriminating against railroads in taxation. Nonetheless, the United States Court of Appeals held that the Fourteenth Amendment renders constitutional the 4-R Act's abrogation of the sovereign immunity guaranteed to the States by the Eleventh Amendment to the United States Constitution.

In 2000, Wyoming enacted a coal transportation tax (W.S. § 39-21-101 *et seq.*) and a tax on railroads (W.S. § 39-20-101 *et seq.*). Respondents sued Petitioners arguing that the coal transportation tax and the railroad tax violated the Railroad Revitalization and Regulatory Reform Act. 49 U.S.C. § 11501. Petitioners moved to dismiss for lack of jurisdiction under Rule 12(b) of the Federal Rules of Civil Procedure. The District Court denied Petitioners' motions. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed without oral argument based upon the circuit law. 270 F.3d 942

(10th Cir. 2001), citing *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999). Petitioners filed a petition for rehearing. Without hearing any argument, the Court of Appeals denied Petitioners' petition.

REASONS FOR GRANTING THE WRIT

I. This Case Raises a Recurring Issue of Nationwide Importance

This case concerns the constitutionality of the abrogation of the Eleventh Amendment by the Railroad Revitalization and Regulatory Reform Act (4-R Act), which prohibits States from discriminating against railroads in taxation. 49 U.S.C. § 11501. The litigation arises from challenges by railroads of two taxes Wyoming adopted in 2000: the coal transportation tax and the tax on railroads. W.S. § 39-21-101 *et seq.*; W.S. § 39-20-101 *et seq.*

The coal transportation tax applies to the commercial transportation of coal regardless of whether that transportation is by railroad, by truck or by trailer. W.S. §§ 39-21-101(a)(ii), 39-21-104(b). The revenues raised by the railroad tax are statutorily dedicated to railroad grade separation facilities. W.S. § 39-20-111.

This case therefore affects the ability of every State in the Nation to require railroads to pay their fair share of taxes, including the share necessary to protect the public from safety hazards railroads create. States have been deterred from enacting such taxes by the mere threat of litigation under the 4-R Act, even when such taxes do not discriminate against railroads and even when such taxes are imposed against railroads in an entirely constitutional

manner. Moreover, the railroad industry is one that holds and receives tens of billions of dollars in property and annual income. Federal Railroad Administration, U.S. Department of Transportation, Report On Policy and Program Development at http://www.fra.dot.gov/policy/freight4.htm.

The 4-R Act prohibits States from discriminating against railroads in taxation. 49 U.S.C. § 11501. The Fourteenth Amendment does not. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 368-369 (1940). In fact, Congress enacted the 4-R Act for the very purpose of prohibiting practices permitted by the Fourteenth Amendment. S. Rep. 91-630, at 7 (1969).

Nonetheless, the Tenth Circuit has ruled that the 4-R Act enforces the Fourteenth Amendment and that the 4-R Act's abrogation of the Eleventh Amendment is therefore constitutional. *Burlington Northern and Santa Fe Ry. Co. v. Burton*, 270 F.3d 942 (10th Cir. 2001). In stark contrast, the Court has held that the Fourteenth Amendment does not confer upon Congress the power to change the Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

The Fourth Circuit has stated that the question of whether the Fourteenth Amendment renders the 4-R Act's abrogation of the Eleventh Amendment constitutional is therefore at a minimum "a controversial issue, which in some appropriate future case will need to be resolved." *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537, 543, n. 4 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998).

That the question of the constitutionality of the 4-R Act's abrogation is recurring is well evidenced by the

numerous previous certiorari petitions relating to the issue. *California State Board of Equalization v. Southern Pacific Transportation Co.*, 528 U.S. 1114 (2000); *California State Board of Equalization v. Atchison, Topeka & Santa Fe Railway Co.*, 528 U.S. 1114 (2000); *Wheeling & Lake Erie Railway Company v. Pennsylvania Public Utility Comm'n*, 528 U.S. 928 (1999); *West Virginia Board of Public Works v. CSX Transportation, Inc.*, 525 U.S. 821 (1998).

The recurring nature of the issue and its importance to the States is also demonstrated by the fact that at least five circuit courts have been asked to rule on the issue on at least six occasions. *CSX Transportation, Inc. v. New York State Office of Real Property Services et alia*, (2nd Cir.) (Docket No. 01-7966) (argued April 29, 2002) (decision pending); *Burton*, 270 F.3d 942 (10th Cir. 2001); *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie R. Co. v. Public Utility Comm'n of the Commonwealth of Pennsylvania*, 141 F.3d 88 (3rd Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line Railroad Co. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998); *CSX Transportation, Inc. v. West Virginia Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998).

Similarly, at least six different district courts have been asked to rule on the matter on at least six different occasions. *CSX Transp., Inc. v. New York State Office of Real Property Services et alia*, 150 F.Supp.2d 605 (S.D.N.Y. 2001), *appeal pending*, Docket No. 01-7966 (2nd Cir.); *CSX Transp., Inc. v. Board of Public Works*, 997 F.Supp. 749 (S.D.W.Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998); *Union Pacific R.R. Co. v. Utah*, 996 F.Supp. 1358 (D. Utah 1997), *rev'd*,

198 F.3d 1201 (10th Cir. 1999); *Union Pacific R. Co. v. Burton*, 949 F.Supp. 1546 (D.Wyo. 1996); *Fox River Valley R.R. Corp. v. Department of Revenue of State of Wisconsin*, 863 F.Supp. 893 (E.D.Wis. 1994); *Southern Pennsylvania Transp. Authority v. Pennsylvania Public Utility Com'n*, 802 F.Supp. 1273 (E.D.Pa. 1992).

The constitutional question of whether the Fourteenth Amendment empowers Congress to abrogate the Eleventh Amendment to prohibit discrimination permitted by the Fourteenth Amendment, and to do so solely in the exercise of its powers to enforce the Fourteenth Amendment, is one that affects every piece of Congressional legislation prohibiting discrimination permitted by the Constitution. It is therefore a recurring question that will precipitate numerous certiorari petitions until answered by the Court.

II. The Tenth Circuit's Holding is Inconsistent with the Decisions of this Court and Other Circuit Courts

This case is remarkably similar to this Court's recent decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). In *Kimel*, the Court held that the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 *et seq.*) was not a valid exercise of Congress' power to abrogate State sovereign immunity to enforce the Fourteenth Amendment, because it attempted to substantively redefine the States' legal obligations under the Fourteenth Amendment with respect to age discrimination. 528 U.S. at 82-92. The Court reached this conclusion because: (1) the legislative history did not evidence a

pattern of discrimination by the States that violated the Fourteenth Amendment, and (2) the ADEA prohibited substantially more practices than would likely be held unconstitutional under the Fourteenth Amendment. *Id.* The 4-R Act's history does not evidence that States were violating the Fourteenth Amendment in their discrimination against railroads. Further, the 4-R Act prohibits substantially more practices than would likely be held unconstitutional under the Fourteenth Amendment. Thus, the 4-R Act is no more a valid exercise of Congress' power to abrogate sovereign immunity to enforce the Fourteenth Amendment than the ADEA was.

A. *The History of Unconstitutional Activity by States Factor*

The legislative history of the 4-R Act may evidence a pattern of States discriminating against railroads, but it does not evidence a pattern of States doing so in a way that violates the Fourteenth Amendment. To the contrary, in fact, the legislative history establishes that the purpose of the 4-R Act was to prohibit State discrimination against railroads for the very reason that the Fourteenth Amendment does not.

By the time the 4-R Act was being considered, the Court had ruled that the Fourteenth Amendment's Equal Protection Clause does not require States to treat different classes differently where those differences may be made the rational basis of legislative discrimination. *Ft. Smith Light & Traction Co. v. Board of Imp. of Paving Dist.*, 274 U.S. 387, 391 (1927); *Cincinnati, N.O. & T.P.R. Co. v. Kentucky*, 115 U.S. 321, 337 (1885). The Court had even

applied that principle to taxation. *Bell's Gap R. Co. v. Com. of Pennsylvania,* 134 U.S. 232, 237 (1890).

In fact, the Court had already held that so far as the Federal Constitution is concerned, a State can put railroads "into one pigeonhole" and other classes into another for purposes of imposing different tax rates. *Nashville,* 310 U.S. at 368-369; *accord, New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573, 578-587 (1938); *Ohio Tax Cases,* 232 U.S. 576 (1914); *New York & N.E.R. Co. v. Bristol,* 151 U.S. 556 (1894).

Indeed, the legislative history of the 4-R Act notes that State treatment of railroad property as a separate class does not violate the Fourteenth Amendment, remarking that court decisions:

> do not reach the situation in which State or local authorities levy discriminatory assessments or tax rates against common carriers, where the express provisions of State law or a State constitution permit such discriminatory treatment. This is most often accomplished by classifying carrier property in a separate class from other taxable property in the same district, a practice which the Supreme Court allowed in *Nashville, Chattanooga & St. L. Ry. v. Browning,* 310 U.S. 362 (1940), against a claim that such classification is violative of the "equal protection" clause of the 14th amendment.

S. Rep. 91-630, at 7.

Accordingly, Professor Paul Sanders, who appeared before Congress on behalf of the Association of American Railroads and several railroads, supported the need for the 4-R Act specifically on the grounds that "the case of

Nashville, Chattanooga & St. Louis Railway v. Browning, decided in 1940, stated that a separate mode of assessment of railroad property at a higher percentage of value did not violate the equal protection clause of the 14th Amendment." H.R. Doc. No. 89-30, at 10, 47, 49 (1966).

Similarly, the Chairman of the Interstate Commerce Commission noted, in hearings regarding the 4-R Act, that State and local governments could treat railroads differently from other classes of taxpayers under the Supreme Court's *Nashville* decision. *Common and Contract Carrier State Property Tax Discrimination: Hearing Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 91st Cong. 5 (1970) (statement of George M. Stafford, Chairman, Interstate Commerce Commission).

A statute whose legislative history does not evidence a pattern of activity by States prohibited by the Fourteenth Amendment and which prohibits substantially more practices than the Fourteenth Amendment is not a valid exercise of Congress' power to abrogate State sovereign immunity in order to enforce the Fourteenth Amendment. *Kimel*, 528 U.S. 62 (2000). While the Tenth Circuit in the case at bar intimated that Congress found that discriminatory taxation of railroads *might* have violated the "rational basis requirement of the Equal Protection Clause," that court did not identify a single excerpt of the legislative history specifically finding that such taxation violated the Equal Protection Clause or lacked a rational basis. *Burton*, 198 F.3d at 1206. Contrary to the intimation of the Tenth Circuit, Congress acknowledged that the Court had expressly ruled that treating railroads differently than others did not violate the Equal Protection

Clause. S. Rep. 91-630, at 7. Indeed, the 4-R Act's legislative history establishes that it was the very constitutionality of such practices, rather than their unconstitutionality, that prompted the 4-R Act's passage.

The power conferred by Section 5 to enforce the Fourteenth Amendment is not unlimited. *City of Boerne v. Flores*, 521 U.S. 507, 518-519 (1997). In particular, it does not include the power to decree the substance of that Amendment's restrictions on the States. *Id.* at 519. Legislation that alters the meaning of a constitutional provision cannot be said to be enforcing that provision. *Id.* "Congress does not enforce a constitutional right by changing what the right is." *Id.* If Congress were given the power to determine what constitutes a Constitutional violation under the guise of enforcing the Constitution, what Congress would be enforcing would no longer be, in any meaningful sense, the Constitution. *Id.* The 4-R Act was a declaration by Congress that certain activities by States violated the Equal Protection Clause, where the Supreme Court had held that those activities did not. The 4-R Act was therefore intended to redefine, rather than merely enforce, the Equal Protection Clause.

Congress made it clear that the 4-R Act was intended to change what the Equal Protection Clause of the Fourteenth Amendment requires. The text of the Act itself declares: "the following . . . discriminate . . . and a State may not do any of them." 49 U.S.C. § 11501(b). Moreover, Congress justified the legislation on the grounds that the Interstate Commerce Act had already set a precedent for the 4-R Act by providing that certain activity by States was "hereby *declared* to constitute an unreasonable and unjust discrimination . . . and is hereby forbidden and

declared to be unlawful." S. Rep. 91-630 at 9, citing Section 13(4) of the Interstate Commerce Act (emphasis supplied).

The Tenth Circuit ruled that the Fourteenth Amendment rendered the 4-R Act's abrogation constitutional in part because the 4-R Act employs a term (discrimination) that is also used in Fourteenth Amendment equal protection analysis. However, what Congress determines constitutes "discrimination" is not necessarily the same as what is discrimination in the constitutional sense. *Reickenbacker v. Foster*, 274 F.3d 974, 981 (5th Cir. 2001); *Popovich v. Cuyahoga County Court of Common Pleas*, 227 F.3d 627, 640-642 (6th Cir. 2000); *Erickson v. Board of Governors*, 207 F.3d 945, 951-952 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001).

Unlike the Tenth Circuit, the Second, Third, Fifth, Sixth and Seventh Circuits have held that legislation which prohibits discrimination against a non-suspect class, regardless of whether such discrimination has a rational basis and serves a legitimate government interest, is not a valid abrogation. *McGinty v. New York*, 251 F.3d 84, 91-92 (2nd Cir. 2001); *Popovich*, 227 F.3d at 637-642 (6th Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 524-529 (5th Cir. 2000); *Lavia v. Pennsylvania Dep't of Corr.*, 224 F.3d 190, 204-206 (3rd Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559, 565-566 (6th Cir. 2000); *Stevens v. Illinois Dep't of Transp.*, 210 F.3d 732, 737-741 (7th Cir. 2000); *Erickson*, 207 F.3d at 951-952 (7th Cir. 2000).

The 4-R Act emerged from the Committee on Commerce to amend the Interstate Commerce Act. The purposes of the 4-R Act set forth in statute were aimed at

furthering commerce. 49 U.S.C. § 10101. In passing the 4-R Act, Congress "invoke[d] the power of the Congress under the commerce clause of the Constitution, Article I, section 8, to promote, foster and protect interstate commerce by relieving and removing burdens thereupon." S. Rep. 91-630, at 9-10 (1969). In fact, the legislative history specifically noted that "the constitutional power of Congress to legislate in this area is clearly appropriate under the commerce clause." S. Rep. 91-630, at 23. The heart of the Act itself is a statement that "the following acts unreasonably burden . . . interstate commerce, and a State . . . may not do any of them." 49 U.S.C. § 11501(b).

The 4-R Act's legislative history establishes that Congress intended to prohibit discriminatory taxation of railroads because it burdened interstate commerce, not because it violated the Fourteenth Amendment. The legislation, Congress explained,

> "invokes the power of the Congress under the commerce clause of the Constitution, Article I, section 8, to promote, foster and protect interstate commerce by relieving and removing burdens thereupon. *Discriminatory State and local taxation practices impede interstate commerce* by weakening the common carrier system which is the instrumentality for the movement of that commerce."

S. Rep. 91-630, at 9-10 (emphasis supplied).

Congress was therefore very explicit that it was passing the 4-R Act pursuant to the Commerce Clause. Congress' Commerce Clause powers do not include the power to abrogate the Eleventh Amendment. *Board of*

Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 78-80.

Where Congress has been so explicit about invoking its authority under a specific provision of the Constitution, courts do not entertain alternative bases for legislation. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642, n. 7 (1999). Thus, the Third Circuit declined to consider the due process clause as an alternative basis for the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, in determining that that Act's abrogation was unconstitutional. *Chittister v. Department of Community and Economic Development*, 226 F.3d 223, 228 n. 3 (3rd Cir. 2000).

Similarly, the First Circuit has rejected the constitutionality of abrogation legislation even though Congress might have found that States had actually been violating the Fourteenth Amendment, because Congress did not in fact find that States had been doing so. *Laro v. New Hampshire*, 259 F.3d 1, 16 (1st Cir. 2001). Likewise, the Fifth Circuit has ruled that it might be "too much of a leap" to infer Congress' reliance on the Fourteenth Amendment in legislation when Congress did not expressly state its intent to legislate on that basis. *Chavez v. Arte Public Press*, 157 F.3d 282, 287 n. 8 (5th Cir. 1998). Similarly, the Sixth Circuit has noted that "in the absence of explicit comment by Congress, only efforts to remedy discrimination against a class of persons that Fourteenth Amendment jurisprudence has already identified as deserving special protection" is properly viewed as legislation passed pursuant to Section 5 of the Fourteenth Amendment. *Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th

Cir. 1996), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997) (per curiam).

In stark contrast, the Tenth Circuit in this case ruled that the "conclusion that the 4-R Act was a valid exercise of Congress' power to enforce the Equal Protection Clause is not, therefore, called into question by Congress' failure to rely expressly on the Fourteenth Amendment." *Burton*, 270 F.3d at 946, citing *Utah*, 198 F.3d at 1208.

It is one thing to rule that legislation can be a valid exercise of Congress' power to enforce the Fourteenth Amendment without expressly relying on Section 5 of the Fourteenth Amendment. *Burton*, 270 F.3d at 946; *accord*, *Utah*, 198 F.3d at 1208-1209. It is altogether another thing to hold that legislation can be a valid exercise of Congress' power to enforce the Fourteenth Amendment when the legislative history clearly establishes that Congress exercised its powers to enact the legislation under the Commerce Clause, and did so to circumvent the fact that activities the legislation was designed to prohibit were constitutional under the Fourteenth Amendment.

In sum, the legislative history indicates that the 4-R Act was passed to prevent discrimination against railroads pursuant to the Commerce Clause, not to prevent violations of the Fourteenth Amendment's Equal Protection Clause. As the Tenth Circuit itself recognized in the case at bar, the law is now clear that Congressional abrogation under the Commerce Clause violates the Eleventh Amendment. 270 F.3d at 946.

B. *The Substantially More Practices Factor*

The Tenth Circuit dismissed Petitioners' claim that the 4-R Act prohibits "substantially more practices" than the Equal Protection Clause of the Fourteenth Amendment on the basis that the 4-R Act only prohibits discrimination against railroads in taxation to the extent that the discrimination rises above 5%. 270 F.3d at 946-947, citing 49 U.S.C. § 11501(c). However, the Fourteenth Amendment does not prohibit discrimination in taxation against a non-suspect class (like railroads) that exceeds 5% where such discrimination has a rational basis and serves a legitimate government interest. *See* Part II.A, *ante* at 7-10. The 4-R Act's abrogation of Eleventh Amendment immunity therefore constitutes a rewriting of the Fourteenth Amendment law on taxation of railroads, just as the abrogation in the Americans with Disability Act (ADA), 42 U.S.C. § 12111 *et seq.*, would rewrite the Fourteenth Amendment law on disability. *Garrett*, 531 U.S. at 370-374.

The 5% threshold does not save the 4-R Act from unconstitutionality. A 5% threshold still prohibits a great deal more conduct than that prohibited by the Fourteenth Amendment – since the Fourteenth Amendment does not prohibit discrimination in taxing railroads in the first place. *Nashville*, 310 U.S. at 368-369. A tax that discriminates against a non-suspect class of taxpayers does not violate the equal protection clause as long as the discrimination has a rational basis and serves a legitimate government interest. *See* Part II.A, *ante* at 7-10. Moreover, the 4-R Act's 5% threshold does not apply to every category of taxes that the 4-R Act prohibits. *See, e.g.*, 49 U.S.C.

§ 11501(b)(4). For all these reasons, the 5% threshold in the 4-R Act is not a proper basis for dismissing a claim that a statute does prohibit "substantially more practices" than the Equal Protection Clause of the Fourteenth Amendment.

This Court concluded in *Kimel* that the ADEA prohibited substantially more practices than the Fourteenth Amendment because the Fourteenth Amendment does not prohibit age discrimination so long as it is rationally related to a legitimate state interest, while the ADEA does. *Kimel*, 528 U.S. at 82-88. The Fourteenth Amendment does not prohibit States from treating railroads differently than other classes of taxpayers, while the 4-R Act does. The 4-R Act therefore prohibits substantially more practices than the Fourteenth Amendment, just as the ADEA does.

The Tenth Circuit's decision that the 4-R Act does not prohibit "substantially more practices" than the Fourteenth Amendment is inconsistent with the long and well established U.S. Supreme Court precedent to the contrary.

III. There is a Disagreement among Courts as to Whether the Abrogation of the Eleventh Amendment in the Railroad Revitalization and Regulatory Reform Act Is a Valid Exercise of Congressional Power to Enforce the Fourteenth Amendment

In the case at bar, the Tenth Circuit has held that the 4-R Act's abrogation of Eleventh Amendment immunity is a constitutional exercise of Congress's powers under Section Five of the Fourteenth Amendment. *Burton*, 270

F.3d 942 at 945-947. The Third and Ninth Circuits have concurred with this conclusion. *Wheeling & Lake Erie R. Co. v. Public Utility Comm'n of the Commonwealth of Pennsylvania*, 141 F.3d 88 (3rd Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line Railroad Co. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998).

However, a good number of judges and courts have reached the opposite conclusion. Thus, Judge Garth of the Third Circuit concluded that the 4-R Act's abrogation of Eleventh Amendment was unconstitutional. *Wheeling & Lake Erie R. Co.*, 141 F.3d at 97-101 (Garth, J., dissenting). Three different federal district courts have reached the very same conclusion. *CSX Transp., Inc. v. Board of Public Works of State of West Virginia*, 997 F.Supp. 749, 750-752 (S.D.W.Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998); *Union Pacific R.R. Co. v. Utah*, 996 F.Supp. 1358, 1360-1362 (D.Utah 1997), *rev'd*, 198 F.3d 1201 (10th Cir. 1999); *Union Pacific R. Co. v. Burton, Director, Wyoming Department of Revenue*, 949 F.Supp. 1546, 1550-1554 (D.Wyo. 1996).

Judge Garth observed that not only was the major purpose of the 4-R Act to protect interstate commerce, but also that "[n]owhere in the 4-R Act can a Congressional expression be found that the 4-R Act was passed to secure the rights under the Fourteenth Amendment." *Wheeling & Lake Erie R. Co.*, 141 F.3d at 99, citing *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). He noted the absence of "any evidence that could support the conclusion that the disparate taxation to which railroads were subjected constituted a violation under the Equal Protection Clause." 141 F.3d at 100. The judge reasoned that

what the 4-R Act does is prohibit long-standing constitutionally permissible discriminatory taxation practices. 141 F.3d at 100.

When the District Court for the District of Wyoming examined each of the fifteen provisions of the 4-R Act setting forth its legislative purpose, the court concluded that those purposes were aimed at furthering commerce. *Union Pacific R. Co.*, 949 F.Supp. at 1554, citing 49 U.S.C. § 10101. The court noted that it "cannot find that there is any evidence by way of a factual predicate to support a finding that the 4-R Act was enacted to further anti-discriminatory or equal protection claims." 949 F.Supp. at 1554. Accordingly, the court found that the purpose of the 4-R Act was to further commerce, not to further the objectives of the Fourteenth Amendment. 949 F.Supp. at 1553-1554, quoting *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 457 (1987).

The District Court for the District of Utah observed that Congress did not cite Section 5 of the Fourteenth Amendment as authority for enacting the 4-R Act. *Union Pacific R.R. Co.*, 996 F.Supp. at 1361, *rev'd*, 198 F.3d 1201 (10th Cir. 1999). The court noted that a court must not " 'quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.' " 996 F.Supp. at 1361-1362, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 16 (1981)). The court therefore ruled that there is not a sufficiently strong connection between protection of railroads and recognized Fourteenth Amendment goals to permit a conclusion that the 4-R Act is legislation passed to enforce the Fourteenth Amendment, "particularly . . . in view of the

clear intent of Congress to pass the 4-R Act to relieve burdens placed on interstate commerce by discriminatory taxation of railroads." *Id.*

CONCLUSION

For all the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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April 30, 2002

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY;

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

vs.

R.M. "JOHNNIE" BURTON, in her official capacity as Director, Wyoming Department of Revenue,

Defendant-Appellant.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

Nos. 00-8087
and 00-8088

(Filed Oct. 24, 2001)

vs.

SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. Nos. 00-CV-108-J and 00-CV-109-J)

Submitted on the briefs:*

James W. McBride and Anne M. Stolee, Baker, Donelson, Bearman & Caldwell, Washington, D.C. and W. Perry Dray, Dray, Thompson & Dyekman, P.C., Cheyenne, Wyoming, for Plaintiffs-Appellees.

Stuart E. Schiffer, Acting Assistant Attorney General, David D. Freudenthal, United States Attorney, Mark B. Stern and Stephanie R. Marcus, Department of Justice, Washington, D.C., for Plaintiff-Intervenor-Appellee.

Gay Woodhouse, Attorney General, Vicci M. Colgan, Chief Deputy Attorney General, Michael Dinnerstein and Harold E. Meier, Cheyenne, Wyoming, for Defendants-Appellants.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause therefore is ordered submitted without oral argument.

Before, Kelly, Circuit Judge, MCKAY, Senior Circuit Judge, and BROWN, Senior District Judge.**

KELLY, Circuit Judge.

Defendants-Appellants R.M. "Johnnie" Burton, Director, Wyoming Department of Revenue, and Sleeter Dover, Director, Wyoming Department of Transportation, ("the State") appeal from the district court's order denying their motions to dismiss. We have jurisdiction over these interlocutory appeals pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *Innes v. Kan. State Univ.*, 184 F.3d 1275, 1277 (10th Cir. 1999) (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding that states may take advantage of the collateral order doctrine to appeal district court orders denying claims of Eleventh Amendment immunity)).

Because "we are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court," *United States v. Morris*, 247 F.3d 1080, 1085 (10th Cir. 2001) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)), we find *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999)

** The Honorable Wesley E. Brown, Sr., Senior District Judge, United States District Court – District of Kansas, sitting by designation.

to be controlling and affirm the district court's order denying the motions to dismiss.

Background

Plaintiffs-Appellees Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Co. ("the Railroads") filed two separate complaints challenging the imposition by the State of Wyoming, through Ms. Burton, of a tax on the transportation of coal (No. 00-8087) and, through Mr. Dover, of a tax on railroad train miles and grade crossings (No. 00-8088).[1] Wyo. Stat. Ann. § 39-21-103 (Michie 2001) (coal transportation tax); Wyo. Stat. Ann. § 39-20-104 (Michie 2001) (train mile tax). The Railroads based their challenge on Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). *See* 49 U.S.C. § 11501. The 4-R Act prohibits states from discriminating by more than 5% in taxing rail transportation property and rail carriers. It also gives federal courts concurrent jurisdiction to hear 4-R Act cases and power to grant injunctive relief. The State moved to dismiss the complaints for lack of subject matter jurisdiction claiming that the 4-R Act is an invalid attempt by Congress to abrogate state sovereign immunity under the Eleventh Amendment. The State argues that this court's precedent in *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999), is not controlling

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[1] Because of the similarity of facts and common question of law, we will consolidate the two appeals together in this order and judgement.

because of changes made in Eleventh Amendment jurisprudence by the United States Supreme Court in its subsequent cases *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001). We review the denial of a state's claim of Eleventh Amendment immunity from suit in federal court de novo. *Innes v. Kansas State Univ.*, 184 F.3d 1275, 1277 (10th Cir. 1999).

Discussion

In *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999), the Union Pacific Railroad Company and the Utah Railway Company both sought relief against the State of Utah from an allegedly discriminatory property tax under the 4-R Act. The State moved to dismiss on the basis of Eleventh Amendment immunity and the district court granted the motion. The plaintiffs appealed and this court reversed the dismissal holding that the 4-R Act was a valid abrogation of Eleventh Amendment immunity. In reaching its decision in *Union Pacific*, this court relied on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999). Subsequent to the issuance of *Union Pacific*, the Supreme Court decided *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001). Unless the Supreme Court has changed the appropriate test for determining what is a valid abrogation of Eleventh Amendment immunity in *Kimel* or *Garrett*, *Union Pacific* is controlling precedent and the denial of the motions to dismiss must be affirmed. *See United States v. Morris*, 247

F.3d 1080, 1085 (10th Cir. 2001) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)).

First, relying on *Florida Prepaid*, this court reiterated in *Union Pacific* that Congress must make an "unmistakably clear expression of congressional intent to abrogate state immunity," *Union Pacific*, 198 F.3d at 1206, and found that Congress had done so in the language of the 4-R Act. *Id.* at 1205-06. *Kimel* and *Garrett* applied this same standard. *See Kimel*, 528 U.S. at 73; *Garrett*, 531 U.S. at ___, 121 S. Ct. at 962. In this action, neither party has argued that Congress did not express its intention to abrogate state immunity.

Second, relying on *Seminole Tribe*, this court noted that "Congress may only abrogate state immunity when it acts pursuant to the legislative authority granted to it by section 5 of the Fourteenth Amendment." *Union Pacific*, 198 F.3d at 1203. Pointing out that the Supreme Court had "left undisturbed the principle that congressional action may be upheld under § 5 even when Congress does not expressly rely on that provision as the source of its abrogation power," this court concluded that the 4-R Act was a valid exercise of congressional authority pursuant to § 5 of the Fourteenth Amendment despite Congress' failure to expressly rely on it. *Id.* at 1203-04. In this action, the State argues that the 4-R Act is not a valid abrogation of sovereign immunity because it was enacted pursuant to Article I's Commerce Clause and not expressly pursuant to section 5. Aplt. Br. at 5. While *Kimel* and *Garrett* do reaffirm that Congress only has the power to abrogate under the Fourteenth Amendment and does not have the power under Article I, neither *Kimel* nor *Garrett* require that Congress expressly rely on section 5. *Kimel*, 528 U.S.

at 78-82; *Garrett*, 531 U.S. at ___, 121 S. Ct. at 961-63. This court's conclusion that the 4-R Act was a valid exercise of Congress' power to enforce the Equal Protection Clause is not, therefore, called into question by Congress's failure to rely expressly on the Fourteenth Amendment. *Union Pacific*, 198 F.3d at 1208.

Third, relying on *City of Boerne*, this court stated that "congressional power under § 5 is remedial in nature, and confers the authority to enforce the Fourteenth Amendment rather than to define its parameters as a matter of substantive law" and that the Supreme Court has established several factors to guide us in determining whether a law enforces or defines. *Id.* at 1204. These factors include: (1) whether the legislative record before Congress indicates that the congressional action taken was necessary and appropriate, (2) whether Congress identified conduct transgressing the Fourteenth Amendment's substantive provision, and (3) whether the remedy is proportional and congruent to the unconstitutional conduct it was enacted to curtail. *Id.* at 1204-05 (citing *City of Boerne* and *Florida Prepaid*). Our "review of the legislative history convince[d the court] that in passing the 4-R Act, Congress was responding to evidence of a pattern of unconstitutional taxation," *id.* at 1206, and "a substantial history of state discrimination in the taxation of railroad property." *Id.* at 1207. This court held that the state conduct identified by Congress was unconstitutional because it violated the Equal Protection Clause. *Id.* at 1208 (citing *Metro Life Ins. Co. v. Ward*, 470 U.S. 869 (1985)). Taking into consideration that only injunctive relief is available and the 5% threshold, we held that the

remedy is "congruent with and in proportion to the Equal Protection violation." *Id.* at 1208.

In this action, the State argues that the R-4 [sic] Act is not a valid abrogation of sovereign immunity because it redefines rather than enforces the Fourteenth Amendment. Aplt. Br. at 6. In support of this assertion, the State claims that in *Kimel* the Supreme Court identified two new factors for determining if a statute permissibly enforces or impermissibly defines the Fourteenth Amendment. Aplt. Br. at 4. These factors are: whether the legislation prohibits substantially more practices than the Fourteenth Amendment does, and whether the history of the legislation reflects a pattern of activity by the states that violates the Fourteenth Amendment. *Id.*

As to the substantially more practices factor, the State claims that the R-4 [sic] Act prohibits all discrimination against railroads while the Equal Protection Clause either does not prohibit discrimination or prohibits only irrational discrimination. Aplt. Br. at 11. Assuming for the sake of argument that the Supreme Court did establish a new "substantially more practices" factor for consideration in *Kimel*,[2] it does not follow that the State would

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[2] This seems unlikely because, in *Kimel*, the Supreme Court describes its decisions in *City of Boerne* and *Florida Prepaid* with approval and states that it is applying the same test for congruence and proportionality. *Kimel*, 528 U.S. at 80-83. Likewise, *Garrett* quoted *City of Boerne* when it stated "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Garrett*, 531 U.S. at ___, 121 S. Ct. at 963. Given these statements by the Supreme Court, this court is inclined to agree

then prevail. First, the State has overlooked the fact that the R-4 [sic] Act prohibits only discrimination that rises above the 5% threshold. 49 U.S.C. § 11501(c). Second, this court in *Union Pacific* already established that discriminatory taxation of railroads violates the Equal Protection Clause. *Union Pacific,* 198 F.3d at 1206-08. Third, even if the R-4 [sic] Act does prohibit some rational discrimination against railroads which the Equal Protection Clause might not prohibit, the Supreme Court has "never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel,* 528 U.S. at 88.

> Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."

Garrett, 531 U.S. at ___, 121 S. Ct. at 963 (quoting *Kimel,* 528 U.S. at 81). Finally, it is clear that this alleged "substantially more practices" factor is not determinative. *Kimel,* 528 U.S. at 88 ("That the ADEA prohibits very little conduct to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry."); *id.* at 91. It is merely another factor to be considered along with other factors.

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with the Railroads' suggestion that "substantially more practices" is merely a new descriptive phrase. Aplee. Br. at 13.

As to whether the history of the legislation reflects a pattern of activity by the states that violates the Fourteenth Amendment, this factor was also addressed in *Union Pacific*. This court's "review of the legislative history convince[d the court] that in passing the 4-R Act, Congress was responding to evidence of a pattern of unconstitutional taxation," *Union Pacific*, 198 F.3d at 1207, and "a substantial history of state discrimination in the taxation of railroad property." *Id.* at 1206. Although the State repeatedly cites to the congressional record, we reviewed that record in *Union Pacific*. As stated above, we cannot overrule the judgement of another panel of this court absent en banc reconsideration or a superseding contrary decision by the Supreme Court. *United States v. Morris*, 247 F.3d 1080, 1085 (10th Cir. 2001) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)). Because we hold that *Union Pacific* survives *Kimel* and *Garrett*, no further review of the congressional record is necessary. *See Kimel*, 528 U.S. at 89; *Garrett*, 531 U.S. at ___, 121 S. Ct. at 967.

In sum, we conclude that the Supreme Court's recent decisions did not contradict *Union Pacific*, it remains controlling precedent, and the 4-R Act is a valid congressional abrogation of state immunity. We, therefore, AFFIRM the district court's denial of the motions to dismiss but express no opinion on the merits of the Railroads' claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, and UNION PACIFIC RAILROAD CO.,	)	
Plaintiffs,	)	No. 00-CV-108-J
v.	)	
R. M. "JOHNNIE" BURTON, DIRECTOR, WYOMING DEPARTMENT OF REVENUE,	)	
Defendant.	)	

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, and UNION PACIFIC RAILROAD CO.,	)	
Plaintiffs,	)	No. 00-CV-109-J
v.	)	
SLEETER DOVER, DIRECTOR, WYOMING DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

(Filed Nov. 20, 2000)

The Motions to Dismiss filed by the defendants in the above captioned proceedings, plaintiffs' responses filed in opposition thereto, the defendants' further replies, as

well as the defendants' Statements of Reconsideration, appealing the Magistrate Judge's related dispositions, have all come before the Court for consideration. A hearing was held on the motions to dismiss on October 13, 2000, with the plaintiffs appearing through counsel, Greg Dyekman, James McBride, and Ann Stolee, and defendants appearing through counsel, Vicci Colgan, Michael Dinnerstein, and Harold Meier, all of the Office of the Wyoming Attorney General. The Court, having considered the parties' written submissions and the materials offered in support of their respective positions, the pleadings of record, the applicable law, the arguments of counsel, and being fully advised, FINDS and ORDERS as follows:

Background

The complaints filed in these cases challenge the imposition by the State of Wyoming, through the defendant Director of the Wyoming Department of Revenue of a tax imposed on the transportation of coal (Case No. 00-CV-108J), and through the defendant Director of the Wyoming Department of Transportation of a tax on railroad train miles and grade crossings (Case No. 00-CV-109J). The plaintiff railroads filed suit pursuant to Section 306 of the Railroad Regulatory and Revitalization Act of 1976 ("4-R Act"), codified at 49 U.S.C. § 11501, alleging the taxes single out railroads for the imposition of discriminatory taxes contrary to federal law. Section 306 of the 4-R Act prohibits discriminatory state taxation of railroads and grants federal district courts jurisdiction to grant injunctive relief preventing such discriminatory taxation.

The State defendants have moved to dismiss these actions, asserting that the suits are barred by the Eleventh Amendment to the United States Constitution and that the suits are barred by the doctrine of sovereign immunity. They rely on recent the United States Supreme Court holding in *Kimel v. Florida Board of Regents,* 120 S.Ct. 631 (2000), to provide support for their arguments that this case cannot be pursued under applicable principles of sovereign immunity.

The State of Wyoming argues that the two cases should be dismissed on jurisdictional grounds and that the suits are barred by the Eleventh Amendment to the United States Constitution. These motions raise issues created by *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114 (1996) and the case law that has followed on its heels addressing these sovereign immunity issues and the scope of congressional abrogation of state sovereign immunity in enacting legislation that affects states.

The State defendants argue that Congress does not have the power to enforce the commerce clause by abrogating sovereign immunity and that because the 4-R act was enacted pursuant to the commerce clause, the Act's abrogation of sovereign immunity is not valid. The State defendants assert that the 4-R act was not enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment. They contend that by the time that the Act was passed, the Supreme Court had repeatedly held that the Fourteenth Amendment did not prohibit states from treating railroads differently from other classes of taxpayers. The State defendants contend that testimony before Congress supports the conclusion that the Act was not enacted pursuant to the Fourteenth

Amendment, as does the plain text of the Act and subsequent case law.

If the Act was enacted pursuant to the Fourteenth Amendment, the State argues alternatively that Congress' power was not validly exercised to abrogate sovereign immunity to enforce the Fourteenth Amendment. It also argues that the *Ex Parte Young* doctrine does not permit suits against individual officials pursuant to the Act because states have special sovereignty interests in their systems of taxation, there is an adequate state forum, and the remedy Congress provided for violations of the Act is a limited remedy.

To the contrary, the plaintiff railroads argue that the Act constitutes the exercise of legitimate congressional power to enforce equal protection of the law pursuant to Section 5 of the Fourteenth Amendment. The railroads rely on *Union Pacific Railroad Company v. Utah,* 198 F.3d 1201 (10th Cir. 1999), which has addressed this issue and determined that the 4-R Act is a valid abrogation of sovereign immunity. The plaintiff railroads argue that the later Supreme Court case of *Kimel v. Florida Board of Regents,* 120 S.Ct. 631 (2000), upon which the state defendants have relied, does not alter this conclusion.

This is the real issue now before this Court for consideration. How does *Kimel* change the equation and how should it apply to the facts at issue in this case?

The plaintiff railroads argue that the 4-R Act was a valid means both to provide a remedy and to deter violations of the railroads' equal protection rights. They argue that this Court also has jurisdiction over the case pursuant to *Ex Parte Young,* 209 U.S. 123 (1908), regardless of

the validity of 4-R Act's abrogation provisions. The *Ex Parte Young* doctrine provides an additional and independent basis for this Court's jurisdiction over the case. The plaintiff railroads argue that the requirements for *Ex Parte Young* relief are: "a *Young* suit is available where a plaintiff alleges an ongoing violation of federal law and where the relief sought is prospective rather than retrospective[,]" citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). Here, the plaintiff railroads are requesting a prospective injunction against future and ongoing attempts of the State defendants to collect taxes which violate federal law. As long as taxes remain unpaid, there is still future action by a State officer that can be enjoined.

The Magistrate's Judge has held that the Tenth Circuit's decision in *Union Pacific R.R. Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999) is dispositive and determined that the State defendants are not entitled to immunity and must therefore participate in discovery pursuant to the Local Rules of this Court.

Standard of Review

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a motion to dismiss may be granted when the district court lacks subject matter jurisdiction. Where the motion to dismiss raises a factual challenge to the existence of subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. This is contrasted to a motion to dismiss asserting a facial attack that challenges the sufficiency of the complaint's factual allegations, when a district court must accept the allegations in the complaint as true. See

Holt v. United States, 46 F.3d 1000, 1002-1003 (10th Cir. 1995).

A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). *Id.* In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 summary judgment motion.

Unless the jurisdictional issue is intertwined with the merits of the plaintiff's case, a district court may properly consider evidence outside of the pleadings and resolve factual disputes without converting the motion into a Rule 56 motion. Where resolution of the jurisdictional issue – i.e., whether the state defendants are entitled to Eleventh Amendment immunity – does not depend on the factual allegations underlying the plaintiffs' substantive claims, the motion may be properly be resolved pursuant to Rule 12(b)(1). On appeal, a district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) will be subject to *de novo* review, with findings of jurisdictional facts reviewed for clear error. *Id.*

Discussion

The Court finds that the motions to dismiss filed by the State should be denied and further finds that the Magistrate Judge's rulings should be affirmed in all respects, for the reasons to be discussed below.

Contrary to the State's assertions, the Court finds that the Supreme Court's *Kimel* decision does not change in any meaningful way the analysis of the Tenth Circuit in the

Utah case upholding the 4-R Act, after considering similar Eleventh Immunity arguments in that case. *Kimel* did not enunciate a new test to be applied in analyzing whether Congress has appropriately exercised its enforcement power under the Fourteenth Amendment in abrogating the states' sovereign immunity.

The State defendants contend that because Congress enacted the 4-R Act pursuant to the Commerce Clause of the United States Constitution, the Act's abrogation of sovereign immunity is not valid. The Tenth Circuit considered similar arguments in *Union Pacific Railroad Company v. State of Utah,* 198 F.3d 1201 (10th Cir. 1999) and found that the 4-R Act was a valid abrogation of states' Eleventh Amendment immunity and that discriminatory taxation of railroads, whether in violation of state provisions or pursuant to them, was the proper object of Congress' power under Section 5 of the Fourteenth Amendment.

Generally applicable principles of law are embodied in the following provisions. The Eleventh Amendment of the United States Constitution states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This immunity is not absolute. "A state may consent to be sued in federal court, or Congress may abrogate sovereign immunity. To abrogate Eleventh Amendment immunity, Congress must have 'unequivocally expresse[d] its intent to abrogate the immunity' and 'acted pursuant to a valid exercise of power.' " *Union Pacific R.R. Co. v. State of Utah,* 198 F.3d at

1203, quoting *Migneault v. Peck*, 158 F.3d 1131, 1135 (10th Cir. 1998).

The Tenth Circuit noted that the United States Supreme Court concluded that "Congress may only abrogate state immunity when it acts pursuant to the legislative authority granted to it by section 5 of the Fourteenth Amendment," *id.*, citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59, 65-66, 116 S.Ct. 11154, 134 L.Ed.2d 252 (1996). In its instructive opinion, the circuit court continued:

> In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Court analyzed the scope of congressional power under § 5, providing the analysis by which we determine whether a congressional abrogation of Eleventh Amendment immunity is a valid exercise of that power. In so doing, the Court articulated several governing principles that we set out below as a framework for our consideration of the validity of the abrogation contained in § 11501 of the 4-R Act.
>
> The Fourteenth Amendment restricts the power of the states by providing that
>
> > [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, § 1. Congressional power to abrogate state immunity is contained in § 5, which provides that "[t]he Congress shall

have power to enforce, by appropriate legislation, the provisions of this article." Id. § 5.

In considering the interplay of these two provisions and the scope of Congress' power under them, the Court initially observed that § 5 is a broad grant of authority. *City of Boerne*, 521 U.S. at 517, 117 S.Ct. 2157.

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 5517-18, 117 S.Ct. 2157 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-56, 25 L.Ed. 676 (1879)). Accordingly, the Court reiterated the principle that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " . . . Moreover, the Court left undisturbed the principle that congressional action may be upheld under § 5 even when Congress does not expressly rely on that provision as the source of its abrogation power. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) [footnote omitted]; see also *Fullilove v. Klutznick*, 448 U.S. 448, 478, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51, 86

S.Ct. 1717, 16 L.Ed.2d 828 (1966); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 037 n. 6 (2d ed. 1988) ("An otherwise valid exercise of congressional authority is not, of course, invalidated if Congress happens to recite the wrong clause . . . as the source of its power – or, indeed, if Congress recites no clause at all.").

The Court cautioned, however, "that '[a]s broad as the congressional enforcement power is, it is not unlimited' " *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157 . . . the court pointed out that congressional power under § 5 is remedial in nature, and confers the authority to enforce the Fourteenth Amendment rather than to define its parameters as a matter of substantive law . . . While recognizing that the line between remedy and substance is not easy to discern, the Court emphasized that "the distinction exists and must be observed." . . . Accordingly, the Court established several factors to guide an assessment of whether an abrogation of immunity under § 5 is a valid remedial measure of an impermissible substantive change in the governing law.

The Court stated that legislation adopted under the enforcement clause must be judged with reference to the historical experience it reflects, . . . and that the "appropriateness of remedial measures must be considered in light of the evil presented[.]" . . . In assessing this factor, the Court looked to the legislative record before Congress as an indication that the congressional action taken was necessary and appropriate. The Court noted that lack of evidentiary support is not conclusive.

Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." As a general matter, it is for Congress to determine the method by which it will reach a decision.

. . .

Accordingly, the Court also looked to whether the legislation was proportional to its remedial or preventive object and could thus "be understood as responsive to, or designed to prevent, unconstitutional behavior." . . . The Court cautioned that the sweep of remedial legislation must be congruent with and carefully directed to the scope of the unconstitutional conduct it was enacted to curtail. *Id.* at 532-34, 117 S.Ct. 2157.

> This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

. . . .

In its most recent examination of Congress' power under § 5, the Court reiterated and applied its holdings in *City of Boerne* that "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ.*

> *Expense Bd. v. College Sav. Bank*, 527 U.S. 6237, ___, 119 S.Ct. 2199, 2207, 144 L.Ed.2d 575 (1999). The Court emphasized that while the lack of legislative history showing that Congress was responding to a history of constitutional violations is not determinative, "identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because '[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.' " *Id.* at 2210 (quoting *City of Boerne*, 521 U.S. at 530, 117 S.Ct. 2157).
>
> The Court has thus made clear that legislation is more likely to be considered a valid exercise of Congress' § 5 authority if it is supported by a legislative record showing the extent of state conduct violative of the Fourteenth Amendment, and if it is carefully drawn to target that conduct.

Union Pacific Railroad Company v. State of Utah, 198 F.3d at 1203-1205 (most citations and footnote omitted).

The Tenth Circuit then went on to apply the above general principles in determining the validity of the abrogation of the Eleventh Amendment immunity contained in the 4-R Act, which is the subject of the instant litigation as well. The applicable substantive provision of the 4-R Act is set out in the opinion as follows:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market

value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b).

Id., 198 F.3d at 1205. Further:

The abrogation of Eleventh Amendment immunity which the Railroads contend permits their suit for relief under the Act provides:

> Notwithstanding section 1341 of title 28 [the Tax Injunction Act [footnote omitted]] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation

property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law.

49 U.S.C. § 111502(c).

To determine whether the above provision is a valid abrogation of state sovereign immunity, we must determine whether Congress unequivocally expressed its intent to abrogate, and whether it acted pursuant to a valid exercise of power. . . . The statute contains an unmistakably clear expression of congressional intent to abrogate state immunity and the parties do not argue otherwise. We therefore must ascertain whether the 4-R Act is a legitimate exercise of Congress' § 5 power.

Following the principles laid down by the Supreme Court, we look first to Congress' identification of the unconstitutional state conduct it intended to remedy in passing the 4-R Act. We begin with the legislative record, which reveals a substantial history of state discrimination in the taxation of railroad property. As the Supreme Court has observed, "[a]fter an extended period of congressional investigation, Congress concluded that 'railroads are overtaxed by at least $50 million each year.' " *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987) (quoting H.R.REP. No. 94-725, at 78 (1975)). The legislative history makes clear that the 4-R Act is intended to eliminate "discriminatory State and local taxation of common and contract carrier transportation property . . . as

an unreasonable and unjust discrimination against . . . interstate commerce." S.REP. NO. 91-630, at 1 (1969)).

> In essence, the provisions of [section 11501] are designed to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district. In describing the extent of discriminatory tax treatment by State and local governments, the Doyle report states that "despite State laws requiring uniform tax treatment, railroads and pipelines are discriminated against as compared to other property taxpayers in the same jurisdiction, due in large measures to outdated procedures (which are sometimes deliberately retained) for assessment of property," and went on to state that [the committee] had information "showing the extent of overpayment of railroad ad valorem taxes resulting from the assessment of railroad property at a percent of its value that is higher than the percent for the assessment of other taxpayer property is to the value of such other property"; and that "This confirmed the findings of this committee that there is a studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates."

Id. at 2. . . . The report also states that "[i]n the last 9 years, the railroads alone have been

assessed more than $900 million in discriminatory taxes." *Id.* at 3. Indeed, the legislative history is replete with evidence of widespread, long-standing and deliberate "discriminatory taxation of interstate common carrier transportation property." *Id.* at 4.

The legislative history sets out Congress' findings that the discriminatory state taxation of interstate railroads runs afoul of the constitution in two ways. First, it may violate the rational basis requirement of the Equal Protection Clause by arbitrarily discriminating against a particular taxpayer contrary to "the applicable State laws or constitutional provisions." *Id.* at 7. Second, it may violate equal protection by placing interstate carriers in a separate tax category which, while permitted by state law, impermissibly discriminates against interstate commerce. *Id.* [footnote omitted]

In addition, Congress took note of the procedural barriers which prevented railroads from obtaining effective relief in state courts. Despite its profound respect for state sovereignty in taxation matters embodied in the Tax Injunction Act, Congress passed § 11501 as an explicit exception to that Act, stating that the effect of the Tax Injunction Act

> has been to close the doors of the Federal courts to carriers affected by discriminatory taxation. It has not, however, insured that the State courts provide carriers with a plain, speedy, and efficient remedy.
>
> The testimony before the committee indicated that present State procedures to challenge discriminatory State tax

> assessments are often difficult, time consuming, and not productive of material relief. For example, the Southern Pacific and its rail affiliates were required to bring 48 separate suits in 48 separate California superior courts to challenge the level of assessments of railroad property by 48 counties and cities in California.

Id. at 6-7. In sum, our review of the legislative history convinces us that in passing the 4-R Act, Congress was responding to evidence of a pattern of unconstitutional taxation.

The type of arbitrary state discrimination against interstate railroads in the assessment and collection of taxes that disturbed Congress was subsequently well illustrated in *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). There, an assessor's valuation practices resulted in the taxation of generally comparable property at rates different than those applied to the railroad in violation of the state constitutional guarantee of equal and uniform taxation. The Supreme Court held the practice unconstitutional, stating that " '[t]he equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " . . . Underlying the Court's decision was the state's failure to justify a discriminatory taxing practice as reasonably related to a legitimate state policy when it violated an expressed state policy of equal and uniform taxation. . . . Thus, Congress' concern as set out in

> the legislative history of the 4-R Act that railroads were the victims of arbitrary discriminatory taxation in violation of state provisions requiring equal and uniform taxation clearly supports the enactment of that legislation under the Equal Protection Clause.
>
> Moreover, classifications that are permitted by state law but result in invidious discrimination against interstate commerce are also property the subject of remedial action under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), the Supreme Court traced the "checkered history" of its "jurisprudence of the applicability of the Equal Protection Clause to discriminatory tax statutes," . . . and held that a state violates equal protection when it imposes " 'more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose[.] . . . We thus conclude that the discriminatory taxation of railroads, whether in violation of state provisions or pursuant to them, is a proper object of Congress' power under § 5 to remedy violations of the Equal Protection Clause.

Id., 198 F.3d at 1205-1208 (most citations, quotations and footnotes omitted).

The circuit court then turned to the second part of the inquiry enunciated by the Supreme Court in *City of Boerne*, examining whether the provision at issue is tailored to remedying or preventing the history of constitutional violations set out above. It stated:

> We begin by observing that, unlike the statute the Court condemned in *City of Boerne*, § 11501 of the 4-R Act is not broad, sweeping legislation that intrudes on state conduct unrelated to the targeted violation. To the contrary, § 11501 is directed at the discriminatory assessment and collection of railroad taxes, and provides a remedy only when such discrimination passes a threshold of five percent. Moreover, the Act permits only injunctive relief and further provides that state law is to govern the burden of proof. The remedy is therefore congruent with and in proportion to the Equal Protection violation. This congruence between the act's remedial or preventative means and the legitimate end it seeks to achieve convinces us that it is a proper exercise of Congress' power under § 5. Accordingly, we join those circuits that have addressed the issue and hold that § 11501 abrogates Eleventh Amendment immunity. See *Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n*, 141 F.3d 88 (3d Cir. 1998), *cert. denied*, No. 99-86, 120 S.Ct. 323, and No. 99-234, 120 S.Ct. 324; *Oregon Short Line R.R. Co. v. Department of Revenue*, 139 F.3d 1259 (9th Cir. 1998).
>
> * * * *

Id., 198 F.3d at 1208 (most citations omitted).

As stated earlier in this opinion, the State defendants urge this Court to find that the United States Supreme Court's opinion in *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000), dictates a result contrary to that reached by the Tenth Circuit in its *Union Pacific Railroad Company v. State of Utah*, 198 F.3d 1201 (10th Cir. 1999). This Court disagrees.

In *Kimel,* the Supreme Court determined that the Age Discrimination in Employment Act ("ADEA") did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals. The *Kimel* court recognized that the ADEA did contain a clear statement of Congress' intent to abrogate states' immunity, but further determined that abrogation exceeded Congress' authority under the endorsement clause, Section 5, of the Fourteenth Amendment. In reaching that conclusion, the Supreme Court considered, and rejected, the argument that the ADEA rested solely on Congress' Article I commerce power. "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 120 S.Ct. at 644. The Supreme Court stated:

> Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power. For example, Congress cannot "decree the *substance* of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine *what constitutes* a constitutional violation." [citing *City of Boerne,* 521 U.S. 507], at 519, 117 S.Ct. 2157 [emphasis in original]. The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. *Id.,* at 536, 117

S.Ct. 2157. In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. *Id.*, at 519-520, 117 S.Ct. 2157. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520, 117 S.Ct. 2157.

In *City of Boerne*, we applied that "congruence and proportionality" test and held that the Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under § 5. We first noted that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only "anecdotal evidence" that, standing alone, did not reveal a widespread pattern of religious discrimination in this country." *Id.*, at 531, 117 S.Ct. 2157. Second, we found that RFRA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 532, 117 S.Ct. 2157.

Last Term, we again had occasion to apply the "congruence and proportionality" test. In *Florida Prepaid*, we considered the validity of the Eleventh Amendment abrogation provision in the Patent and Plant Variety Protection Remedy

> Clarification Act (Patent Remedy Act). We held that the statute, which subjected States to patent infringement suits, was not appropriate legislation under § 5 of the Fourteenth Amendment. The Patent Remedy Act failed to meet our congruence and proportionality test first because "Congress identified no pattern of patent infringement *by the States*, let alone a pattern of constitutional violations." 527 U.S., at ___, 119 S.Ct., at 2207 [emphasis in original]. Moreover, because it was unlikely that many of the acts of patent infringement affected by the statute had any likelihood of being unconstitutional, we concluded that the scope of the Act was out of proportion to its supposed remedial or preventive objectives. . . . Instead, "[t]he statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime." . . . While we acknowledged that such aims may be proper congressional concerns under Article I, we found them insufficient to support an abrogation of the States' Eleventh Amendment immunity after *Seminole Tribe. Florida Prepaid*, supra, at ___, 119 S.Ct., at 2211.

Kimel, 120 S.Ct. at 744-645 (most citations omitted).

The Supreme Court applied the congruence and proportionality tests to conclude that the ADEA was not appropriate legislation under section 5 of the Fourteenth Amendment. It noted that the substantive requirements imposed by the ADEA on state and local governments were disproportionate to any unconstitutional conduct that could be targeted by the ADEA. Age classifications were not, historically, deemed to reflect prejudice and

antipathy and older persons had not been subjected to a history of purposeful unequal treatment. *Id.* at 645. Age did not define a "discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Id.* After reviewing a significant body of law concerning the ADEA, the Supreme Court stated:

> That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy, or instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action. . . . "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." . . .
>
> Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. . . .
>
> * * * *

> A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, . . . Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Kimel, 120 S.Ct. at 648-650 (most citations omitted).

The Court agrees with the plaintiff railroads' assertion that *Kimel* broke no new ground and merely applied the principles set out by the United States Supreme Court initially in *Seminole Tribe,* followed later by *City of Boerne v. Flores* and the subsequent line of cases analyzing these Eleventh Amendment/abrogation issues.[1] Specifically, *Kimel* considered (1) whether Congress has unequivocally expressed its intention to abrogate sovereign immunity of

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[1] The district court in Utah stated, in a case considering the same issues with respect to the Americans with Disabilities Act ("ADA"), that "[t]he *Kimel* Court merely applied the previous tests it had announced in *Seminole Tribe* and refined in *City of Boerne." Davis v. Utah State Tax Commission,* 96 F.Supp.2d 1271, 1277 (D.Utah 2000).

the States under the ADEA (clear statement of Congressional intent to abrogate sovereign immunity of the states) and (2) whether Congress acted pursuant to a valid grant of constitutional authority – i.e., whether abrogation was within Congress's authority under § 5 of the Fourteenth Amendment. The Supreme Court in *Kimel* applied these principles to find clear intent to abrogate sovereign immunity, but concluded that it was not pursuant to a valid grant of constitutional authority. The *City of Boerne* "congruence and proportionality" test was applied by the Supreme Court in *Kimel,* leading to the conclusion that the ADEA was not appropriate legislation under § 5 of the Fourteenth Amendment.

The Tenth Circuit's *Union Pacific Railroad Company v. State of Utah,* 198 F.3d 1201 (10th Cir. 1999) predates the *Kimel* decision, but its analysis is consistent with the principles applied by the Supreme Court in *Seminole Tribe, City of Boerne,* and *Kimel,* in that it considered carefully and identified the evil Congress intended to remedy, to be judged with reference to historical experience in determining that Congress acted pursuant to its enforcement power under § 5 of the Fourteenth Amendment. The Tenth Circuit also looked power under § 5 of the Fourteenth Amendment. The Tenth Circuit also looked to whether the legislation was proportional to its remedial or preventive object, applying the congruence and proportionality test from the *City of Boerne.* This Court perceives little in *Kimel* that would compel it to conclude that the Tenth Circuit's decision in *Union Pacific Railroad Company v. State of Utah,* 198 F.3d 1201 (10th Cir. 1999) should have been decided differently. See also *Wheeling & Lake Erie Railway Company v. Public Utility*

Commission of the Commonwealth of Pennsylvania, 141 F.3d 88 (3d Cir. 1998) (finding Congress validly abrogated Eleventh Amendment immunity, pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, when it enacted 4-R Act); *Oregon Short Line Railroad Company v. Department of Revenue Oregon,* 139 F.3d 1259 (9th Cir. 1998) (upholding 4-R Act, finding it properly abrogated State's Eleventh Amendment immunity); *CSX Transportation, Inc. v. Bd. of Public Works of the State of West Virginia,* 138 F.3d 537 (4th Cir. 1998) (declining to resolve question whether abrogation of sovereign immunity is valid or invalid, instead relying upon *Ex Parte Young* doctrine for its analysis). The Tenth Circuit has also considered how *Kimel* affected prior Tenth Circuit precedent with respect to the ADA, and cited with favor the district court's opinion in *Davis v. Utah State Tax Commission,* 96 F.Supp.2d 1271, 1277 (D.Utah 2000), concluding that the ADA's abrogation of Eleventh Amendment immunity is "sound and need not be altered because of the analysis in *Kimel.*" *Cisneros v. Wilson,* 2000 WL 1336658, *11. The Tenth Circuit does not appear to perceive *Kimel* as effecting a sweeping change in the manner in which Eleventh Amendment abrogation issues should be analyzed. With the benefit of this illumination, this court doubts that the Tenth Circuit's analysis of the 4-R Act would change significantly, contrary to the position asserted by the State defendants in this case.

For these reasons, the Court concludes that the defendants' motions to dismiss should be DENIED and further concludes that the defendants' motions to reconsider the rulings of the Magistrate Judge should be denied and that the rulings of the Magistrate Judge in his

September 29, 2000 Orders Ruling on Defendants' Motions to Stay Discovery and Request for Protective Order and Orders on Initial Pretrial Conference issued October 24, 2000 should be affirmed in all respects. Further, because of this disposition, the Court declines the parties' request to rule on the *Ex Parte Young* issues raised by the parties' in their written submissions. Accordingly, it is therefore

ORDERED that the defendants' Motions to Dismiss shall be, and are, **DENIED. It is further**

ORDERED that the rulings of the Magistrate Judge in his September 29, 2000 Orders Ruling on Defendants' Motions to Stay Discovery and Request for Protective Order and October 24, 2000 Orders on Initial Pretrial Conference shall be, and are, **AFFIRMED IN ENTIRETY. It is further**

ORDERED that the defendants' Motions to Reconsider (Statements of Reconsideration) the rulings of the Magistrate Judge shall be, and are, **DENIED.**

Dated this 20th day of November 2000.

/s/ Alan B. Johnson
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY;

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

v.

R.M. "JOHNNIE" BURTON, in her official capacity as Director, Wyoming Department of Revenue,

Defendant-Appellant.

No. 00-8087 and 00-8088

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

v.

SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Defendant-Appellant.

ORDER

Filed January 31, 2002

Before **KELLY, McKAY**, Circuit Judges and **BROWN*** Senior District Judge.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Steve Larson
Deputy Clerk

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* The Honorable Wesley E. Brown, Sr., Senior District Judge, United States District Court, District of Kansas, sitting by designation.

UNITED STATES CONSTITUTION

The Commerce Clause of Section 8 of Article I

Powers of Congress.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes

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The Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall a State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

The Railroad Revitalization and Regulatory Reform Act (4-R Act)

49 U.S.C. § 10101

§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

49 U.S.C. § 11501

§ 11501. Tax discrimination against rail transportation property

(a) In this section –

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section –

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true

market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

WYOMING STATUTE
TITLE 39. TAXATION AND REVENUE
CHAPTER 20. TAX ON RAILROADS

§ 39-20-101. Definitions

(a) As used in this chapter:

(i) "Train mile" means each mile traveled by a train in this state regardless of the number of cars in the train.

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§ 39-20-102. Administration

The department of transportation shall enforce the provisions of this chapter.

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§ 39-20-103. Imposition

There is levied an excise tax on each railroad transporting freight in this state. The tax shall be independent of any assessment of costs for benefits received by the railroad from projects for the construction, rehabilitation, relocation or modification of railroad grade separation facilities.

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§ 39-20-104. Taxation rate

The tax shall be levied at the rate of seven cents ($.07) for each train mile operated by the railroad in the state and one hundred dollars ($100.00) for each public grade crossing on the line of the railroad in this state.

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§ 39-20-105. Exemptions

There are no specific applicable provisions for exemptions for this chapter.

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§ 39-20-106. Licensing; permits

There are no specific applicable provisions for licensing and permits for this chapter.

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§ 39-20-107. Compliance; collection procedures

(a) Returns and reports. On or before May 1 of each year, each railroad shall submit to the department of transportation a report of its total train miles operated within the state during the previous calendar year and the number of public grade crossings on its line in the state at the close of the previous year.

(b) Payment. All taxes shall be due on the date of reporting and shall be delinquent if not paid on or before May 1. The department of transportation shall collect the tax due pursuant to this chapter from each railroad transporting freight within the state.

(c) Timelines. There are no specific applicable provisions for timelines for this chapter.

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§ 39-20-108. Enforcement

(a) Audits. There are no specific applicable provisions for audits for this chapter.

(b) Interest. Interest at an annual rate equal to the average prime interest rate as determined by the state treasurer during the preceding fiscal year plus four percent (4%) shall be added to all delinquent taxes under this chapter. To determine the average prime interest rate, the state treasurer shall average the prime interest rate for at least seventy-five percent (75%) of the thirty (30) largest banks in the United States. The interest rate on delinquent taxes shall be adjusted on January 1 of each year following the year in which taxes first became delinquent. In no instance shall the delinquent tax rate be less than twelve percent (12%) nor greater than eighteen percent (18%).

(c) Penalties. The following shall apply:

(i) If any person fails to make or file a return and remit the tax as required by this chapter the department shall impose a penalty of five percent (5%) of the taxes due for each thirty (30) day period, or fraction thereof, elapsing between the due date of the return and the date filed, unless the person for good cause obtains from the department an extension of time for filing prior to the due date for filing. In no event shall the total penalty imposed by this paragraph exceed twenty-five percent (25%) of the tax due. The department, for good cause, may waive all or a portion of any penalty imposed for failure to file a return timely, provided that:

(A) The return was filed within five (5) business days following the due date,

including an approved extensions period; and

(B) The taxpayer requests the waiver in writing within fifteen (15) days after the return was filed, setting forth the reasons for the late filing.

(ii) If any part of a tax deficiency is due to negligence or intentional disregard of rules and regulations there shall be added a penalty of five percent (5%) of the amount of the deficiency plus interest as provided by subsection (b) of this section. The taxes, penalty and interest shall be paid by the taxpayer within ten (10) days after receipt of notice and demand by the department;

(iii) Taxes due together with interest, penalties and costs shall be collectible by the department by appropriate judicial proceedings;

(iv) The department may credit or waive penalties imposed by this section as part of a settlement or for any other good cause.

(d) Liens. Any delinquent tax is a lien upon the property of any owner from and after the time the tax is due until the tax is paid. The tax lien shall have preference over all liens except any valid mortgage or other liens of record filed or recorded prior to the date the tax became due.

(e) Tax sales. There are no specific applicable provisions for tax sales for this chapter.

§ 39-20-109. Taxpayer remedies.

There are no specific applicable provisions for taxpayer remedies for this chapter.

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§ 39-20-110. Statute of limitations

There are no specific applicable provisions for a statute of limitations for this chapter.

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§ 39 20-111. Distribution

All money derived from the tax imposed by this chapter shall be deposited into an account within the highway fund which shall be allocated and expended for the purpose of constructing, rehabilitating, relocating or modifying railroad grade separation facilities.

WYOMING STATUTES
TITLE 39. TAXATION AND REVENUE
CHAPTER 21. EXCISE TAX ON COMMERCIAL TRANSPORTATION OF COAL

§ 39-21-101. Definitions

(a) As used in this chapter:

(i) "Department" means the department of revenue;

(ii) "Commercial transportation of coal" means the movement of coal using equipment

authorized for use on public roads or railroads by private, contract or common carriers.

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§ 39-21-102. Administration

The department of revenue shall enforce the provisions of this chapter. The department shall promulgate rules and regulations necessary for the implementation and enforcement of this chapter.

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§ 39-21-103. Imposition

There is levied an excise tax on each person commercially transporting coal in this state. The tax shall be applied to any person commercially transporting coal within the state of Wyoming.

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§ 39-21-104. Taxation rate

(a) The tax shall be levied at the rate of one-tenth of one mill (.0001) for each ton, or portion thereof, of coal commercially transported per mile, or portion thereof, in this state. The tax shall be imposed upon any coal produced in this state.

(b) In no event shall the tax upon any person commercially transporting coal in this state be less than fifty cents ($.50) per truck, trailer or railcar used to transport coal.

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§ 39-21-105. Exemptions

The tax imposed by this chapter shall not apply to any person transporting coal for his own personal use and not for commercial gain.

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§ 39-21-106. Licensing; permits

There are no specific applicable provisions for licensing and permits for this chapter.

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§ 39-21-107. Compliance; collection procedures

(a) Returns and reports. On or before May 1 of each year, each person commercially transporting coal in this state shall submit to the department of revenue, on forms prescribed by the department of revenue, a report of the total amount of tons of coal and total miles transported in this state during the previous calendar year.

(b) Payment. All taxes shall be due on the date of reporting and shall be delinquent if not paid on or before May 1. The department of revenue shall collect the tax due pursuant to this chapter from each person liable for the tax imposed by this chapter.

(c) Timelines. There are no specific applicable provisions for timelines for this chapter.

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§ 39-21-108. Enforcement

(a) Audits. There are no specific applicable provisions for audits for this chapter.

(b) Interest. Interest at an annual rate equal to the average prime interest rate as determined by the state treasurer during the preceding fiscal year plus four percent (4%) shall be added to all delinquent taxes under this chapter. To determine the average prime interest rate, the state treasurer shall average the prime interest rate for at least seventy-five percent (75%) of the thirty (30) largest banks in the United States. The interest rate on delinquent taxes shall be adjusted on January 1 of each year following the year in which taxes first became delinquent. In no instance shall the delinquent tax rate be less than twelve percent (12%) nor greater than eighteen percent (18%).

(c) Penalties. The following shall apply:

(i) If any person fails to make or file a return and remit the tax as required by this chapter the department shall impose a penalty of five percent (5%) of the taxes due for each thirty (30) day period, or fraction thereof, elapsing between the due date of the return and the date filed, unless the person for good cause obtains from the department an extension of time for filing prior to the due date for filing. In no event shall the total penalty imposed by this paragraph exceed twenty-five percent (25%) of the tax due. The department, for good cause, may waive a penalty imposed for failure to file a return as required by this section, provided that:

(A) The return was filed within five (5) business days following the due date,

including an approved extension period; and

(B) The taxpayer requests the waiver in writing within fifteen (15) days after the return was filed, setting forth the reasons for the late filing.

(ii) If any part of a tax deficiency is due to negligence or intentional disregard of rules and regulations there shall be added a penalty of five percent (5%) of the amount of the deficiency plus interest as provided by subsection (b) of this section. The taxes, penalty and interest shall be paid by the taxpayer within ten (10) days after receipt of notice and demand by the department;

(iii) Taxes due together with interest, penalties and costs shall be collectible by the department by appropriate judicial proceedings;

(iv) The department may credit or waive penalties imposed by this section as part of a settlement or for any other good cause.

(d) Liens. Any delinquent tax is a lien upon any property of any person owing the tax, from and after the time the tax is due until the tax is paid. The tax lien shall have preference over all liens except any valid mortgage or other liens of record filed or recorded prior to the date the tax became due.

(e) Tax sales. There are no specific applicable provisions for tax sales for this chapter.

§ 39-21-109. Taxpayer remedies

The tax imposed and paid pursuant to this chapter shall be a tax credit against sales taxes paid by the same person when that person is exempt from the fuel tax due under W.S. 39-17-104(a) or 39-17-204(a), but is not exempt from sales tax on that fuel.

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§ 39-21-110. Statute of limitations

There are no specific applicable provisions for a statute of limitations for this chapter.

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§ 39-21-111. Distribution

All net revenues derived from the tax imposed by this chapter shall be deposited into an escrow account until such time as the attorney general certifies to the governor and the legislature that no obligations remain attached to the tax collections. No expenditures shall be made from the escrow account except as authorized under this section. At the time of certification, all net revenues derived from the tax and all amounts within the escrow account shall be transferred to the permanent Wyoming mineral trust fund.

Supreme Court, U.S.
FILED
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CLERK

No. 01-1617

IN THE
SUPREME COURT OF THE UNITED STATES

**EARL ATWOOD, DIRECTOR
WYOMING DEPARTMENT OF REVENUE,
AND SLEETER DOVER, DIRECTOR
WYOMING DEPARTMENT OF TRANSPORTATION,
Petitioners,
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY, UNION PACIFIC RAILROAD COMPANY,
AND THE UNITED STATES OF AMERICA,
Respondents.**

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents restate the Question Presented as follows:

Do federal district courts have jurisdiction over cases brought against state officials seeking prospective injunctive relief pursuant to Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501, either by the express abrogation of state sovereign immunity contained in the statute or by the application of the doctrine of *Ex parte Young*?

PARTIES TO THE PROCEEDING

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

The Burlington Northern and Santa Fe Railway Company is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, a publicly held corporation. No other publicly held company owns 10% or more of the stock of the Burlington Northern and Santa Fe Railway Company.

Union Pacific Railroad Company states that Union Pacific Corporation owns 62.6% of its stock, and that Southern Pacific Rail Corporation owns 37.4% of its stock. Southern Pacific Rail Corporation is wholly owned by Union Pacific Corporation. No other publicly held company owns 10% or more of the stock of Union Pacific Railroad Company.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 01-1617

EARL ATWOOD, Director, Wyoming Department of Revenue, and SLEETER DOVER, Director, Wyoming Department of Transportation,
Petitioners,
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and the UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("Section 306"), 49 U.S.C. § 11501 (Supp. V 1999), which prohibits state tax discrimination against railroads and grants the federal courts jurisdiction to prevent violations.[1] Section 306(1)(d), the specific subdivision applicable in this case, prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."[2]

STATEMENT OF THE CASE

This case involves two civil actions seeking injunctive and declaratory relief from the Petitioners, the Director of the Wyoming Department of Revenue and the Director of the Wyoming Department of Transportation ("Directors"), seeking to enjoin them from imposing or collecting certain taxes imposed on Respondents the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (referred to collectively as "the Railroads"). The Railroads contended that these taxes violate Section 306(1)(d).

The Railroads are both interstate common carriers subject

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[1] Section 306 was enacted as Pub. L. No. 94-210 (1976).

[2] The same provision as codified, § 11501(b)(4), states that a state, subdivision of a state, or authority acting for a state or subdivision, may not impose "another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part." Although the language of Section 306 as codified differs slightly from the language of Section 306 as originally enacted, the codification was not intended to make any substantive change to the meaning of Section 306. *See Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 457 n. 1 (1987).

to the jurisdiction of the Surface Transportation Board, and are both doing business in Wyoming. As such, they are both subject to two new taxes enacted in the State of Wyoming in the year 2000.

The first tax at issue, known as the Train Mile Tax, imposes an excise tax on railroads transporting freight in Wyoming. See W.S. 39-20-101 through 39-20-111. The Train Mile Tax is imposed at the rate of seven cents ($.07) for each train mile[3] operated by any railroad in the State of Wyoming, and one hundred dollars ($100.00) for each public grade crossing on the line of the railroad in the State of Wyoming. It is estimated that the Train Mile Tax imposed on the two Railroads together will amount to approximately $1,500,000.00 annually. The Department of Transportation, as administered by the Director, is charged with enforcing all provisions of the Train Mile Tax, including collection of the tax. The Train Mile Tax is imposed exclusively on railroads. No other taxpayers in the state of Wyoming are subject to this tax.

The second new tax, known as the Coal Transportation Tax, imposes an excise tax on each person commercially transporting coal in Wyoming. See W.S. 39-21-101 through 39-21-111. "Commercial transportation of coal" is defined as the movement of coal using equipment authorized for use on public roads or railroads by private, contract, or common carriers. Although the tax is nominally imposed on all types of carriers, as a practical matter the tax falls almost entirely on railroads. Virtually all coal in Wyoming is transported by rail, and the limited amount transported by motor carrier is carried

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[3] A "train mile" is defined as each mile traveled by a train in the state regardless of the number of cars in the train.

almost exclusively in intrastate commerce.[4] It is estimated that the coal transportation tax imposed on the two railroads together will amount to approximately $7,000,000 annually. The Department of Revenue, as administered by the Director, is charged with enforcing all provisions of the Coal Transportation Tax, including collection of the tax.

The Railroads asserted in their complaints that these two taxes single out railroads for the imposition of taxes that are not generally imposed on other commercial and industrial taxpayers in the State of Wyoming, and thus the taxes result in discriminatory treatment of common carriers by rail in violation of Section 306(1)(d). The Railroads requested preliminary and permanent injunctive relief enjoining the Directors from imposing or collecting the two taxes from the Railroads.

The Directors moved to dismiss both cases on the grounds of Eleventh Amendment immunity. The district court denied the motions to dismiss, and the Directors appealed to the Tenth Circuit, which affirmed based on its earlier decision in *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999). In both the district court and the Tenth Circuit, the Railroads asserted that the federal courts had jurisdiction over these actions both under the express abrogation of state sovereign immunity contained in Section 306, and under the doctrine of *Ex parte Young*. The Tenth Circuit's decision focused solely on the abrogation issue, and did not address the Railroads' *Ex parte Young* claims.

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[4] Some of the carriage by motor vehicles does not move over public roads and is thus not subject to the tax. The statutory definition excludes all movement of coal that is in or near the mine, and all movement of coal that is not on public roads. It does not exclude any movement of coal by rail.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. First, the complaints in this case seek only declaratory and injunctive relief against two state officials. Regardless of whether Section 306 validly abrogated state sovereign immunity, the District Court had jurisdiction under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to grant the relief sought compelling the Directors to comply with federal law. Second, there is no conflict among the Circuit Courts of Appeals that have addressed the Eleventh Amendment immunity issue presented in the petition. Third, the Tenth Circuit's conclusion that in enacting Section 306 Congress validly abrogated state sovereign immunity from suit in federal court is based on a correct application of this Court's recent jurisprudence to the legislative record supporting the enactment of this particular statute.

1. It Is Unnecessary to Decide the Constitutional Question Presented Because Independent Grounds Support Jurisdiction

It is unnecessary to decide the constitutional question the Directors present because independent grounds support jurisdiction in this case regardless of whether Section 306 validly abrogates state sovereign immunity. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), federal courts have jurisdiction over lawsuits, such as this one, that allege an ongoing violation of federal law, and seek prospective rather than retrospective relief against state officials. *Verizon Maryland Inc. v. Pub. Serv. Comm'n*, 122 S.Ct. 1753, 2002 WL 1008485, at * 6-7 (U.S. May 20, 2002). In recent cases, this Court has reaffirmed this right to prospective injunctive relief even in cases in which the Court has held that there was

no constitutionally valid abrogation of state sovereign immunity. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 374 n. 9 (2001); *Alden v. Maine*, 527 U.S. 706, 747-48 (1999).

In this case, the Railroads are requesting only prospective injunctive relief against the future and ongoing attempts of the Directors to collect taxes which violate federal law. The defendants named in the complaints are the two state officials responsible for collection of the taxes. Neither the State nor any state agency is named a party, and no damages or any other retrospective relief is sought. In addition to invoking a right to relief under Section 306 itself, the Railroads argued to both courts below that the district court had jurisdiction pursuant to *Ex parte Young*. *See* Appendix to Petition at App. 14-15.[5] Therefore, the district court had jurisdiction over this action regardless of the outcome of the abrogation issue, and there is no occasion for this Court to decide that constitutional question.[6]

The requirements for obtaining *Ex parte Young* relief are simple: "a *Young* suit is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." *Idaho v. Coeur d'Alene*

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[5] The district court expressly declined to decide that issue (App. 37), and the Tenth Circuit did not discuss it.

[6] *See Massachusetts v. Westcott*, 431 U.S. 322, 323 (1977) (declining to decide a privileges and immunities clause claim based on "our longstanding principle of deciding constitutional questions only when necessary"). *See also United States v. Locke*, 471 U.S. 84, 92 (1985) ("The entire case includes nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court").

Tribe, 521 U.S. 261, 294 (1997) (Opinion of O'Connor, J.) (emphasis in original). In *Verizon*, this Court reiterated the "straightforward inquiry" governing suits for *Ex parte Young* relief:

> In determining whether the doctrine of *Ex parte Young* avoids an eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'

122 S. Ct. at ___, 2002 WL 1008485, at *6 (citing *Coeur d'Alene*, 521 U.S. at 296 (opinion of O'Connor, J.)).

The relief sought by the Railroads in this case falls squarely within these parameters. Here the Railroads are requesting a *prospective* injunction against the *future and ongoing* attempts of the Directors to collect taxes which violate *federal* law. This, in light of *Verizon*, is where the inquiry should end.[7]

In the courts below, the Directors argued that *Ex parte Young* should not apply, based primarily on the doctrine of comity. The comity doctrine, however, has little application in Section 306 cases. As this Court unanimously held in

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[7] The only federal circuit court that has directly addressed the issue has concluded that *Ex parte Young* relief is available to enforce Section 306's prohibition against discriminatory state taxation. *See CSX Transportation Co. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998) (where railroad sought an injunction against future collection of unpaid taxes, the relief sought was prospective and the court had jurisdiction under *Ex parte Young*). That conclusion clearly comports with the criteria established by this Court in *Verizon* and *Coeur d'Alene*.

Burlington Northern R.R. Co. v. Oklahoma Tax Commission, 481 U.S. 454, 464 (1987):

> Respondents contend that injunctive relief against state taxation offends the principles of comity. Brief for Respondents State Board of Equalization et al. 41-42. The Court of Appeals found that its restrictions on valuation actions under [Section 306] are necessary in order to avoid "an inevitable clog of federal dockets" and "unreasonable delays of the state tax collection process." App. to Pet. for Cert. 10a. These are policy considerations which may have weighed heavily with legislators who considered the Act and its predecessors. It should go without saying that we are not free to reconsider them now.

Therefore, Congress has already considered and dealt with the concept of comity in enacting Section 306, and this Court has affirmed that Congress had the authority to do so. Where Congress has validly proscribed certain acts by state officials, the Supremacy Clause makes its proscription binding. To give force to the Clause, federal courts must have jurisdiction to prohibit state officials from ongoing actions that violate the congressional proscription. *Ex parte Young* provides the means to do so. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause"); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1986) (*Young* doctrine "permit[s] the federal courts to vindicate federal rights and to hold state officials responsible to the supreme authority of the United States") (both quoted in *Coeur d'Alene*, 521 U.S. at 293 (opinion of O'Connor, J.)). There is simply no reason why the mechanism provided by *Ex parte*

Young cannot be used to enforce a right which Congress has granted and which this Court has upheld.

It is a cardinal principle of this Court's jurisprudence that the Court will not review the constitutionality of an act of Congress if the case may be disposed of on alternate grounds. *Slack v. McDaniel*, 529 U.S. 473, 485 (2000) ("[T]he 'Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of[.]'" (citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 192-93 (1909) (upholding railroad's injunction against state railroad commission on state law grounds, without reaching federal constitutional question). As the recent *Verizon* decision demonstrates, the Court need not decide the constitutionality of a congressional abrogation of Eleventh Amendment immunity where the federal court has independent jurisdiction under *Ex parte Young*. *Verizon*, 122 S.Ct. at ___, 2002 WL 1008485, at *6. Because *Young* provides the federal district court with jurisdiction over this lawsuit seeking relief against state officials under Section 306, the Court need not decide the constitutional abrogation question presented by the Directors.

2. There is No Conflict Among the United States Courts of Appeals or Between a United States Court of Appeals and a State Court of Last Resort on the Abrogation Issue

The Directors state as grounds for granting the writ that there is "disagreement among courts" on the abrogation issue. The only disagreement, however, is from district courts whose opinions have been reversed or overturned, and one dissenting judge on the Third Circuit. Even if it were necessary to decide

the abrogation issue, this simply does not constitute sufficient grounds under Rule 10 for granting a writ of certiorari.

The issue of whether Section 306 properly abrogates state sovereign immunity has been argued before five of the circuits. One case, as noted by the Directors, was argued before the Second Circuit on April 29, 2002, and has not yet been decided.[8] Of the other four, all have upheld federal jurisdiction over Section 306 cases. The Third, Ninth, and Tenth Circuits all held that Section 306 properly abrogated state sovereign immunity.[9] The Fourth Circuit held that because the district court had jurisdiction pursuant to *Ex parte Young*, it was unnecessary to decide the abrogation issue.[10]

Therefore, there has been unanimity among the Courts of Appeals that have decided these cases that railroads may maintain Section 306 actions in federal court either pursuant to the statute's express abrogation of state sovereign immunity, or under the doctrine of *Ex parte Young*. The Directors' reliance on district court opinions that are no longer good law and on one dissenting Third Circuit judge simply does not establish any conflict that rises to the level required for this Court to grant a

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[8] *CSX Transportation, Inc. v. New York State Office of Real Property Services, et al.*, Case No. 01-7966 (2d Cir.)(decision pending).

[9] *Wheeling & Lake Erie Railway Co. v. Public Util. Comm'n of the Commonwealth of Pennsylvania*, 141 F.3d 88, 94 (3d Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line R.R. Co. v. Department of Revenue Oregon*, 139 F.3d 1259, 1267 (9th Cir. 1998); *Union Pacific R.R. Co. State of Utah*, 198 F.3d 1201 (10th Cir. 1999); and the case below, *Burlington Northern Santa Fe R.R. Co. v. Burton*, 270 F.3d 942 (10th Cir. 2001), App. 1-10.

[10] *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998).

petition for certiorari.

3. The Decision of the Tenth Circuit is Correct

The decision of the Tenth Circuit in this case was based on a careful analysis of the legislative history of Section 306, on the decisions of other Courts of Appeals upholding the validity of Section 306, and on the decisions of this Court defining the scope of congressional authority to enforce the substantive provisions of the Fourteenth Amendment. That decision is correct, and this Court need not disturb it.

There have now been four decisions by United States Courts of Appeals holding that Congress validly abrogated state sovereign immunity by enacting Section 306 under Section 5 of the Fourteenth Amendment: *Oregon Short Line R.R., supra*; *Wheeling & Lake Erie, supra*; *Union Pacific v. Utah, supra*; and the case below, *Burlington Northern v. Burton*, App. 1-10. All of these cases were decided based on an analysis of this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In addition, in the case below, the Tenth Circuit carefully analyzed this Court's most recent decisions applying the *City of Boerne* test : *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). These four decisions from three Circuits are all in agreement that the abrogation provision of Section 306 is constitutionally valid under Section 5 of the Fourteenth Amendment.

In *City of Boerne*, this Court first articulated its "congruence and proportionality" test for determining whether legislation is "appropriate" to enforce the substantive provisions of the Fourteenth Amendment. In the line of cases from *City of Boerne* through *Board of Trustees v. Garrett*, this Court has consistently applied a two part analysis in determining whether

legislation is appropriate under Section 5. First, did Congress have a legitimate basis for deciding that a remedy was necessary to enforce the provisions of the Fourteenth Amendment; and second, is the remedy Congress enacted congruent and proportional to the harm sought to be prevented.

The first part involves an analysis of whether the congressional action can properly be deemed legislation that enforces the provisions of the Fourteenth Amendment. Where, as here, no "suspect class" is involved, the Court is required to examine the legislative record to see if there are express findings of discrimination on the part of the states against the protected class. After this analysis of the basis for the legislation, the Court then examines the remedy provided to see if it is congruent and proportional to the harm being redressed.

Section 306 fits perfectly within the *City of Boerne* "congruence and proportionality" rubric. Section 306 protects a very narrow class of taxpayers, and it is targeted only at states and state subdivisions. It does not prohibit states from taxing railroads, but invalidates only the portion of the tax that is discriminatory. It provides only for equitable and declaratory relief. As the Tenth Circuit held:

> [U]nlike the statute the Court condemned in *City of Boerne*, [Section 306] of the 4-R Act is not broad, sweeping legislation that intrudes on state conduct unrelated to the targeted violation. To the contrary, [Section 306] is directed at the discriminatory assessment and collection of railroad taxes, and provides a remedy only when such discrimination passes a threshold of five percent. Moreover, the Act permits only injunctive relief and further provides that state law is to govern the burden of proof. The

> remedy is therefore congruent with and in proportion to the Equal Protection violation.

198 F.3d at 1208.

. The Directors argue that Section 306 is not "congruent and proportional" because it prohibits some taxes that might not be unconstitutional. This misstates the *City of Boerne* standard, however. As this Court emphasized in *Kimel*:

> Congress' § 5-power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority *both to remedy and to deter* violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is itself not forbidden by the Amendment's text.

528 U.S. at 81, citing *City of Boerne*, 521 U.S. at 518 [emphasis added].

At the time it enacted Section 306, Congress had before it 15 years of legislative history establishing a pattern of discriminatory state tax practices against railroads. Early on, that discrimination mostly took the form of "the deliberate practice of assessing railroad property at a proportion of full value substantially higher than the other property subject to the same tax rates." S. Rep. No. 445, 87th Cong., 1st Sess. (1961), at 458. Congress was fully aware of and concerned with equal protection violations when it was considering the enactment of Section 306. As Congress knew, this Court had several times held that discriminatory state taxation of railroads violated equal

protection rights.[11] In addition, Congress was aware of more recent district court cases invalidating discriminatory state taxation of railroads as being in violation of the Equal Protection Clause.[12]

Later, Congress noted that states were starting to seek to avoid the effect of the decisions prohibiting discriminatory assessments by relying on higher tax rates or assessment ratios on railroad property, i.e., classification:

> An ominous trend is the consideration being given by more and more States to the utilization of classification, that is, higher tax rates on transportation and utility company property, as the most effective means of perpetuating tax discrimination.
>
> The committee was advised that within the last 2 ½ years proposals have been made in nine States to classify railroads and public utilities at different and higher tax rates.

S. Rep. No. 630, at 6. At the time this report was written, in 1969, *no* states had classification systems. By 1976, when Section 306 was enacted, only one state -- Tennessee -- had adopted a classification system, but proposals were moving

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[11] *See, e.g., Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907).

[12] *See* S. Rep. No. 630, 91st Cong., 1st Sess. (1969), at 7, citing *Louisville & Nashville R.R. Co. v. Public Service Commission of Tennessee*, 249 F.Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968); and *People v. Belt Ry. Co. of Chicago*, 226 N.E.2d 265 (1967).

forward in other states. Since these proposals did not actually go into effect until after most of the legislative history of Section 306 had been written, it is clear that the discrimination described by Congress in this and earlier reports was not based on classification, the type of discrimination that the Directors allege would pass constitutional muster. Rather, it was based on the systematic and unequal application of state law, the type of discrimination found to be unconstitutional in *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989).

As this Court has repeatedly emphasized, Congress is not limited to enacting a statute that prohibited only conduct which itself would be unconstitutional. Once unconstitutional conduct is found to exist, Congress is entitled "both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is itself not forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81. Here the legislative history showing the existence of proposals in a number of states designed to perpetuate tax discrimination against railroads by changing the form of such discrimination, and the actual enactment of such a proposal by one state, fully justified Congress' conclusion that, to eradicate the discrimination, it was necessary to sweep more broadly. Its enactment of a statute prohibiting discriminatory classification of railroads, as well as prohibiting "any other tax that results in discriminatory treatment of railroads," was clearly appropriate. These steps were necessary "both to remedy and to deter" violations of the railroads' rights.

The Directors erroneously assert in their Petition that the *Kimel* case established a new and different standard for whether an act of Congress passes muster under Section 5 of the Fourteenth Amendment: whether the act prohibits "substantially more practices" than would be found to be unconstitutional in the absence of the act. This language from the *Kimel* decision,

however, is not a new or different standard at all; it is simply a description of the lack of proportionality of the remedies provided under the ADEA. In fact, this Court specified in that decision that it was simply following the "congruence and proportionality" standard that it had already laid out in *City of Boerne* and *Florida Prepaid Postsecondary Educ. Expense Board v. College Sav. Bank*, 527 U.S. 627 (1999). *Kimel*, 120 S.Ct. at 645.

While Section 306 may prohibit some practices that would not be held to be unconstitutional, the remedy provided by Section 306 is "congruent and proportional" to the targeted harm. It would be difficult to imagine a more tailored or limited response to the widespread discriminatory state practices that were detailed in the legislative history of Section 306. Section 306 goes no further than it must to achieve its goal. First, the remedy granted by Section 306 -- prospective injunctive relief -- is essentially co-extensive with the relief otherwise available under the *Ex parte Young* doctrine. Second, it sets out a specific test to determine if discrimination exists. In essence, this is a disparate impact test, as recognized by this Court in *Burlington Northern v. Oklahoma Tax Commission*. Third, it allows relief to be granted only if there is at least a 5% difference in the ratios applied to railroad property versus other commercial and industrial property.[13] Fourth, it specifies that in determining whether discrimination exists, the court must apply the state's burden of proof, and that burden is clearly on the railroad plaintiff to prove its case. Fifth, while it prohibits certain tax assessments, it prohibits only the discriminatory

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[13] The Directors argue that this 5% threshold is the sole basis for the Tenth Circuit's ruling that Section 306 is congruent and proportional, and does not prohibit "substantially more practices" than would be held to be unconstitutional. On the contrary, this is simply one of the factors that Congress used to narrow the remedy of Section 306 as much as possible.

portion of those tax assessments. Finally, its effective date was delayed for three years to give states the opportunity to remedy their own discriminatory practices before railroads would be able to bring suit in federal court. These are all indicia of narrowly tailored remedial legislation.

Because Section 306 is a proportionate response to a legitimate constitutional threat -- well-documented state tax discrimination against railroads -- it is valid enforcement legislation under Section 5 of the Fourteenth Amendment. The Tenth circuit's decision upholding Congress' abrogation of state sovereign immunity in Section 306 is fully consistent with this Court's Fourteenth amendment jurisprudence, and there is no occasion for further review.

CONCLUSION

None of the issues raised in the Petition merit review by this Court. Because an alternative ground for federal court jurisdiction exists in these cases, there is no necessity for this Court to rule on the constitutional validity of Section 306's abrogation of state sovereign immunity. In addition, there is no conflict among courts on the issue presented. Finally, the decision below was based on a well-reasoned analysis of this Court's Fourteenth Amendment jurisprudence, and is completely consistent with those decisions. The Petition does not present any grounds for granting certiorari within the meaning of Rule 10 of the Rules of this Court and should be denied.

Respectfully submitted,

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No. 01-1617

In the Supreme Court of the United States

EARL ATWOOD, ET AL.,
Petitioners

v.

BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF WEST VIRGINIA, PENNSYLVANIA, COLORADO, DELAWARE, FLORIDA, IDAHO, INDIANA, IOWA, MISSOURI, MONTANA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS AND UTAH, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI

The *amici* States, like Wyoming, are responsible for enacting and administering tax systems within their respective jurisdictions. These tax systems produce revenues which support critical government functions such as criminal justice systems, fire and police protection, and educational systems. Many amici States tax property belonging to railroads such as the Burlington Northern or wish to tax such property but are discouraged from doing so because they may be subjected to suit in federal court under the abrogation provision of the Railroad Revitalization and Regulatory Reform Act–the statute at issue in this case.

In enacting and administering their tax systems, States may choose to tax properties differently taking into account local conditions and expressed public policy preferences of their electorate without affronting the Equal Protection Clause of the Fourteenth Amendment. The undue injection of federal courts into State tax matters risks serious disruption of State tax programs and unduly infringes not only on the practical aspects of tax administration but subjects the sovereign States to the indignity of being sued in federal court by private citizens.

SUMMARY OF ARGUMENT

1. This case presents an important issue of federal law which has not been, but should be, reviewed by this Court. The lower federal courts and judges have reviewed the 4-R Act's abrogation with widely differing conclusions. The important and recurring issue of whether Congress validly abrogated the States' sovereign immunity under the 4-R Act counsels that this Court address this issue to avoid any future split among the federal courts.

2. The 4-R Act is not the only federal statute containing an abrogation clause. The Motor Carrier Act contains a similar abrogation provision which extends preferential tax protection to motor carriers of property and passengers. Adjudication of the Constitutionality of Congress's abrogation under the 4-R Act will help address the same issue under the Motor Carrier Act.

3. To find the 4-R Act a valid enactment under the enforcement clause of the 14th Amendment results in the 4-R Act substantively redefining the rights afforded taxpayers by the Equal Protection Clause of the Fourteenth Amendment. Congress can only validly abrogate the States' sovereign immunity when enforcing the Fourteenth Amendment. A substantive Congressional redefinition of the Equal Protection Clause is prohibited by the Constitutional structure. Further, the invasion of the States' sovereign immunity under the 4-R Act strikes at the States' ability to furnish essential government services as well as affronts the dignity of the States as co-equal sovereigns in the federal system.

ARGUMENT

I. The Railroad Revitalization Act of 1976, Which Implicates Important Principles of State Sovereign Immunity and Autonomy, Has Spawned Considerable and Increasing Litigation.

In 1976, Congress enacted Section 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act). Pub. L. No. 94-210, § 306, 90 Stat. 31, 54-55, *codified as amended at* 49 U.S.C. § 11501.[1] Section 306 declared that certain acts "unreasonably burden and discriminate against interstate commerce, and a State, ... or authority acting for a State ... may not do any of them."

> In broad terms, Congress declared in § 306(b) that assessment ratios or taxation rates imposed on railroad property which differ significantly from the ratios or rates imposed on other commercial and industrial property are prohibited as burdens on interstate commerce.

Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 457 (1987). Section 306 then purported to abrogate the

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[1]Congress recodified the 4-R Act in 1978, moving Section 306 and slightly altering its language, but making no substantive change. Revised Interstate Commerce Act, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. *See* H.R. Rep. 95-1395, at 178-79, *reprinted in* 1978 U.S.C.C.A.N. 3009, 3013. *See also Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Congress again moved Section 306 without substantive change as part of the ICC Termination Act of 1995. *See* Pub. L. No. 104-88 § 102(a), 109 Stat. 803, 845.

States' sovereign immunity and subject them to suit in federal court. *See* 49 U.S.C. § 11501(c).

The important nature of this case is set against the backdrop of the critical role States play in the federal system.

> The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, ... underscore the vital role reserved to the States by the constitutional design.

Alden v. Maine, 527 U.S. 706, 713 (1999). This Court has consistently recognized the textual, structural, historical, ideological and practical principles of State sovereign immunity. *See, e.g., Bd. of Trustees v. Garrett,* 531 U.S. 356 (2001); *Kimel v. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.* ,527 U.S. 666 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1996); *Monaco v. Mississippi*, 292 U.S. 313 (1934); *In re New York*, 256 U.S. 490 (1921); *Hans v. Louisiana*, 134 U.S. 1 (1890).

Section 306 has engendered a "considerable amount of litigation" because of its substantive provisions and the large amounts of money at issue. Jay M. Zitter, *Validity, Construction, and Effect of § 102(a) of the Railroad Revitalization and Regulatory Reform Act (49 U.S.C.S. § 11501)*, 143 A.L.R. Fed 347, 364 (1998). Likewise, the infringement of State sovereign immunity under the 4-R Act helped, at least in part, to contribute to "federal courts [] becom[ing] forums for a considerable amount of litigation over the statute's construction." I Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* 4-210 & n. 926 (3d ed. Nov. 2001). Indeed, the number of reported cases

contained in the American Law Reports Annotation on Section 306 exceeds seventy-seven. *See* 143 A.L.R. Fed at 358-61 & Supp.

The 4-R Act is still a rich font of considerable litigation and disagreement. While several Courts of Appeal have concluded that the 4-R Act validly abrogated State immunity under Congress's section five enforcement power of the Fourteenth Amendment, *see Union Pac. R.R. Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie Ry. Co. v. Pub. Utility Comm'n*, 141 F.3d 88 (3d Cir.1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line R.R. Co. v. Department of Rev.*, 139 F.3d 1259 (9th Cir.1998), these views are not unanimously shared among all jurists on the federal bench.

The District Court for Wyoming found the 4-R Act's purported abrogation invalid, *Union Pac. R.R. v. Burton*, 949 F. Supp. 1546, 1554 (D. Wyo. 1996), a conclusion also reached by another district court, although reversed on appeal. *Union Pacific R.R. Co. v. Utah*, 996 F. Supp. 1358, 1362 (D. Utah 1997), *rev'd*, 198 F.3d 1201 (10th Cir. 1999). Further, the District Court for the Southern District of West Virginia reached the same conclusion that the 4-R Act's abrogation was invalid, although the Court of Appeals reversed the decision on other grounds. *See CSX Trans. v. Bd. of Pub. Works*, 997 F. Supp. 749, 752 (S.D. W. Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir.), *cert denied*, 525 U.S. 821 (1998).

Further, Judge Garth dissented from the holding in *Wheeling & Lake Erie* that the 4-R Act validly abrogated the States' sovereign immunity. 141 F.3d at 97 (Garth, J., dissenting). And, the Fourth Circuit recognized, albeit in the context of avoiding the abrogation issue and reversing the district court, that "[t]he district court raised a controversial issue, which in some appropriate future case will need to be resolved." *CSX*

Trans., v. Bd. of Pub. Works, 138 F.3d 537, 540 n.4 (4th Cir.), *cert denied*, 525 U.S. 821 (1998).

Indeed, the number of States petitioning for certiorari — States as diverse as California, Pennsylvania and West Virginia — indicates the contemporary relevance, importance and recurrence of this "controversial" issue. *See California State Bd. of Equal. v. Southern Pac. Trans. Co.*, 528 U.S. 1114 (2000); *California State Bd. of Equal. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 428 U.S. 1114 (2000); *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Pub. Utilities Comm'n*, 528 U.S. 928 (1999); *West Virginia Bd. of Pub. Works v. CSX Trans.*, 525 U.S. 821 (1998).

The ramifications for the States and the railroads are tremendous and are brought into stark relief by considering the extent of railroads throughout the United States. In the United States, railroads are classified as Class I, II, or III depending on adjusted annual operating revenue. 49 C.F.R. § 1201.1-1 (2001). In 2001, Class I "line haul freight railroads [had] operating revenue in excess of $261.9 million." Association of American Railroads, *Class I Railroad Statistics,* www.aar.org/PubCommon/Documents/AboutThe Industry/statistics.pdf (last updated Apr. 16, 2002). In 2001, there were eight Class I freight railroads systems in the United States. *Ibid.* Two Canadian Railroad Companies own railroads in the United States that by themselves would constitute Class I railroads. *Ibid.*

Examples of the extent of Class I railroads in the United States are the Union Pacific Railroad, one of the country's largest railroads with 33,586.3 miles of track in 23 states in the western two-thirds of the United States and owning 6,921 locomotives and 153,272 freight cars, Union Pac. R.R., *General Public Overview*, www.uprr.com/aboutup/uprrover.shtml (visited May 13, 2002), Kansas City Southern Railway that operates 3,130 miles of track in eleven central and southeastern states, Kansas

City Southern Railway, *Kansas City Southern Rail Network*, www.kcsi.com/kcsr_m.html (visited May 13, 2002), and CSX Transportation a "major eastern railroad, provid[ing] rail transportation and distribution services over a 22,700 route-mile network in 23 states, the District of Columbia and two Canadian provinces," CSX Corp., *Co. Profile*, www.csx.com/aboutus/company/profile/ (visited Apr. 25, 2002). The Class I railroads alone operate rolling stock of 19,745 locomotives (2001 projected data) and 560,154 freight cars (2000 data). Association of American Railroads, *Class I Railroad Statistics, supra.*

Also illustrative of the importance and widespread implications for the States and the railroads are statistics relating to the Class II and III railroads. For example, Alabama has 5 Class I and 18 Class III railroads, Alabama Dep't of Trans., *Statewide Trans. System Overview*, www.dot.state.al.us/ bureau/transportation_planning/stateplan/system_overview.htm (visited May 13, 2002), Arkansas has 3 Class I and 23 Class III railroads, Arkansas State Highway and Trans. Dep't & Federal Highway Admin., *Arkansas Statewide Long-Range Intermodal Transportation Plan* 37 (Feb. 2002), Minnesota has (including 4 Class I railroads) 856 miles of track among 6 Class II railroads and 764 miles of track among 14 Class III railroads, Minnesota Dep't of Trans., *Railroad Transportation in Minnesota*, www.dot.state.mn.us/ ofrw/railroads.html (visited May 9, 2002), Ohio has (including 3 Class I railroads) 4 Class II and 23 Class III railroads, Ohio Dep't of Trans., Fact Book, *Rail Trans.*, www.dot.state.oh.us/planning/Urban/Fact%20Book/sect15.pdf (visited May 9, 2002), and as of 1999 Texas had 3 Class I railroads, 1 Class II railroad and 39 Class III railroads. Railroad Comm'n of Texas, *Railroads Operating in Texas-1999*, www.rrc.state.tx.us/divisions/rail/99operrr.htm (visited May 13, 2002). Thus, this case affects a major industry and the vast majority of States, involves considerable sums of public revenue

and raises an important constitutional question that will reappear until definitively decided by this Court.[2]

This case presents an appropriate vehicle to settle the "controversial" and important issue of whether Congress in the 4-R Act exceeded its authority, affronted the States' sovereign immunity and invaded the judiciary's "province and . . . duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (footnote omitted) ("Because of the importance of the questions presented and conflicting views in the courts of appeals and the district courts, we granted certiorari."); *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 646 (1981) ("We granted the state officials' petition for writ of certiorari in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts.")

Further, because "a number of decisions exhibit some tension on" the questions raised in the petition, this Court should grant the writ in order to "to forestall a possible conflict in the lower courts . . . ." *Dawson Chem. Co. v. Rohm and Hass Co.*, 448 U.S. 176, 185 & n.4 (1980). The Court should grant the Petition to address the important and repetitive question it presents.

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[2]The Court of Appeals for the Second Circuit heard arguments in the appeal in *CSX Trans. v. New York Office of Real Prop. Serv.*, 150 F. Supp.2d 605 (S.D.N.Y. 2001), on April 29, 2002. Likewise, the Fourth Circuit heard arguments on May 7, 2002, in *CSX Trans. v. Bd. of Pub. Works of the State of West Virginia*, No. 01-2492 (4th Cir.) (interlocutory appeal of unpublished decision denying motion to dismiss, *inter alia*, under the Eleventh Amendment).

II. The 4-R Act Is Not the Only Federal Statute Which Grants Preferential Treatment to Certain Taxpayers from Presumptively Constitutional State Taxes.

The 4-R Act is not the only federal statute in which Congress has limited the States' taxing power and then sought to strip them of their sovereign immunity. In the Federal Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823-24 (codified as amended at 49 U.S.C. § 14502),[3] "[C]ongress extended to motor vehicle carriers protection against discriminatory state property taxes that is similar to protection it had previously enacted for railroads." I Hellerstein & Hellerstein, *supra,* at 4-213. Congress expanded this preferential protection from state tax burdens to motor carriers of passengers as well as to motor carriers of property in the Bus Regulatory Reform Act of 1982. Pub. L. No. 97-261, § 20, 96 Stat. 1102, 1122 (currently codified at 49 U.S.C. § 14502)). Because the Motor Carrier Act's abrogation provision was based upon and is almost identical to Section 306, "cases construing the 4-R Act and its legislative history are relevant to an analysis of the MCA." *ABF Freight System v. Tax Div.*, 787 F.2d 292, 299 n.1 (8th Cir. 1986).

These creeping inroads on state sovereign immunity give point to Justice O'Connor's observation that:

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[3]Congress moved section 31 of the Motor Carrier Act without substantive change in the ICC Termination Act of 1995. *See* Pub. L. No. 104-88, §§ 103, 14502, 109 Stat. 803, 852, 900-901; *Bruker Instruments v. Bay State Moving Systems*, 15 F. Supp.2d 156, 157 n.2 (D. Mass. 1998).

> [E]rosion of state sovereignty is likely to occur a step at a time. "If there is any danger, it lies in the tyranny of small decisions–in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."

South Carolina v. Baker, 485 U.S. 505, 533 (1998) (O'Connor, J., dissenting) (quoting Laurence Tribe, *American Constitutional Law* 318 (2d ed. 1988)). As James Madison observed in the *Federalist Papers*, "It will not be denied that power is of an encroaching nature and it ought to be effectively restrained from passing the limits assigned to it." *The Federalist* 48 at 276 (James Madison) (Clinton Rossiter ed. 1999 reprint). The Court should grant the Petition to address the important question it raises as the resolution will affect other federal statutes beyond the 4-R Act.

III. The Area of Taxation Is of Vital Importance to the States as it Is One of the Most Basic (If Not the Most Basic) Powers of Sovereignty and an Indispensable Attribute for Political Survival.

"[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy & O'Connor, JJ., concurring). "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)), *quoted in Gregory v. Ashcraft*, 501 U.S. 452, 458 (1991). *See also Printz v. United States*, 521 U.S. 898, 921

(1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty.")

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory, 501 U.S. at 458. The concentration of power in the hands of any one branch of government or in one of the two sovereigns making up the Union "may justly be pronounced the very definition of tyranny." *The Federalist* 47 at 269 (James Madison) (Clinton Rossiter ed., 1999 reprint). The 4-R Act violates these basic principles of federalism and the structural separation of powers created in the Constitution.

A. Construing the 4-R Act as premised on the Congressional enforcement power under Section 5 of the 14th Amendment, results in Congressional redefinition of this Court's Equal Protection jurisprudence. Because Congress does not enforce a right by redefining it, Congress could not have validly abrogated the States' immunity under Section 5.

Congress lacks the power under Article I of the Constitution to abrogate the States' Eleventh Amendment immunity. *Bd. of Trustees v. Garrett*, 531 U.S. at 364. Congress may abrogate the States' immunity only under its enforcement power contained in Section 5 of the Fourteenth Amendment. *Id.* Congress, however, does not enforce a right by redefining what

a right is in contravention Supreme Court pronouncements. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Construing the 4-R Act as being supported by the 14th Amendment results in a Congressional redefinition of Fourteenth Amendment discrimination — an act invading the sovereign immunity of the States and usurping the "duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. at 177.

This Court has repeatedly said, "[i]nherent in the power to tax is the power to discriminate in taxation." *Medlock v. Leathers*, 499 U.S. 439, 451 (1991). "The restriction that [the power to tax] shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal . . . classification for taxation . . . ." *State Bd. of Tax Comm'rs. v. Jackson*, 283 U.S. 527, 537 (1931). *See also Kahn v. Shevin,* 416 U.S. 351, 355 n.10 (1974); *Caskey Bakery Co. v. Virginia,* 313 U.S. 117, 121 (1941); *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 367-68 (1914). "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized," and has "only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies." *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940) (footnote omitted). Because classification has traditionally been used to fit tax programs to local needs and usages to obtain a fair allocation of the tax burden, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.* at 88. *See also Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992); *Mueller v. Allen,* 463 U.S. 388, 396 (1983); *Regan v. Taxation without Representation*, 461 U.S. 540, 547 (1983); *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 40-41 (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 294 (1898).

There is no real question that the 4-R Act forbids State tax classifications which are well within the permissible limits the Equal Protection Clause imposes.[4] Indeed, "This Court has approved the adoption of modes and methods of assessment and administration peculiar to railroads and upheld tax rates for railroads differing from those on other property...." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. at 579 (citations omitted). In short, "so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another...." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940). *See also Florida Cent. & P.R. Co. v. Reynolds*, 183 U.S. 471, 480 (1902). States are not

> required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value, [for otherwise,] "the essential taxing power of the State [would be subjected] to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

Allied Stores v. Bowers, 358 U.S. 522, 527 (1959), *quoting Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930). The 4-R Act thus

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[4]This point is so obvious that one railroad actually conceded it — at least until the *City of Boerne* decision. In a brief filed in the Court of Appeals, CSX Transportation argued, "'Congress may statutorily define federal equal protection rights and prescribe remedies to enforce them, irrespective of how the courts may have interpreted them. Section 306 is precisely such a statute.'" *Quoted in CSX Trans. v. Bd. of Pub. Works*, 138 F.3d 537, 540 n.4 (4th Cir. 1998).

prohibits that which the Fourteenth Amendment clearly permits. The 4-R Act subjects the States "to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.'" *Allied Stores*, 358 U.S. at 527. Congressional abrogation in the 4-R Act is invalid and this Court should grant certiorari in this case to definitively announce this conclusion.

B. Congress skewed the delicate balance between the States and the Federal government and interfered with the most important sovereign attribute of any government–the power to tax.

Respondents will presumably assert that the question presented in this case is of little national importance because, even if the 4-R Act's abrogation of the Eleventh Amendment is found unconstitutional, the federal courts would still have jurisdiction over 4-R Act claims under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Powerful arguments can be levied, however, against application of the *Ex parte Young* doctrine to tax cases. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 281 (*Ex parte Young* action may not be maintained if it implicates a State's "special sovereignty interests"); *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871))("'It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'"); *Bank of Commerce v. Tennessee*, 161 U.S. 134, 136 (1896)("Taxes [are] the sole means by which sovereignties can maintain their existence[.]"); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (Marshal, C.J.) ("[T]he power of taxing the people and their property is essential to the very existence of

government . . . ."). *Accord Arkansas v. Farm Credit Services*, 520 U.S. 821, 826 (1997); *State Bd. of Tax Comm'rs v. Jackson*, 283 U.S. at 537; *Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 29 (1873). Indeed, the Tenth Circuit has concluded that a State's exercise of the taxing power is a special sovereign interest beyond the application of the doctrine of *Ex parte Young*. *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1189-94 (10th Cir. 1998). As the Tenth Circuit has said:

> We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership of land, *cf.* [*Idaho v.*] *Coeur d'Alene Tribe*, 117 S.Ct. [2028,] 2041 [(1996)], it is impossible to imagine that a state government could continue to exist without the power to tax.

Id. at 1193. *See also Neinast v. Texas*, 217 F.3d 275, 282 (5th Cir. 2000) (defining the authority of a State to choose revenue sources as a "core state power.").

This Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. at 586. Congress itself enacted 28 U.S.C. § 1341 providing, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This broad provision (which the Congress vitiated in the 4-R Act, *see* 49 U.S.C. § 11501(c); *Oregon Rev. Dep't v. ACF Indust.*, 510 U.S. 332, 342 (1994)), is best understood as but

a "partial codification of the federal reluctance to interfere with state taxation," *National Private Truck Council*, 515 U.S. at 586, as evidenced by cases which, post-section 1341, have precluded actions against States for relief not covered by Section 1341's terms. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1942); *Green v. Mansour*, 474 U.S. 64, 72 (1985) ("In *Great Lakes Co. v. Huffman* ... we held that a declaratory judgment was not available to obtain a determination of the constitutionality of a state tax even though the relevant federal statute prohibited federal courts only from issuing injunctions against the collection of such taxes").

The 19 States in the Third, Ninth, and Tenth Circuits, however, have no recourse to these compelling arguments as their Courts of Appeal have already upheld the 4-R Act's abrogation of the States' immunity. Only this Court's review of the question presented in this case can restore the sovereign interests impaired by those circuit court decisions.

More generally, all States, regardless of the circuit within which they are located, can only definitively free themselves of improper federal court interference with their tax collection if this Court favorably resolves the abrogation issue — whether before or after the Court addresses the *Ex parte Young* issue.[5]

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[5]The Fourth Circuit is the only court of appeals to have specifically held that a 4-R Act case may proceed in federal court under the *Ex parte Young* exception. See *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998). In that case, however, the Court did not address the *Coeur d'Alene* "special sovereignty interest" argument. The State of West Virginia has recently asked the Fourth Circuit to revisit its prior holding in light of *Coeur d'Alene*.

It cannot be forgotten that States are not mere political provinces subsidiary to the federal government. *See Alden v. Maine*, 527 U.S. 706, 715 (1999); *New York v. United States*, 505 U.S. 144, 188 (1992). States retain "a residuary and inviolable sovereignty." *The Federalist* 39 at 213 (James Madison) (Clinton Rossiter, ed. 1999 reprint). Indeed, the Eleventh "Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993).

Moreover, there is an extremely pragmatic aspect of federalism. The tax power is not only an "indispensable attribute of sovereignty," it is absolutely necessary to support government, maintain law and order and protect life and property. *In re West Coast Rubber Corp.*, 290 F. 160, 161 (9th Cir. 1923), *aff'd*, 268 U.S. 1 (1925). The States are primarily responsible for governing the polities that daily touch most directly every facet of life–facets reaching from the monumental to the mundane. They posses primary responsibility for defining and enforcing criminal law, *e.g., Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), for providing life sustaining services such as fire and police protection, *see New Jersey v. New York*, 523 U.S. 767, 793 (1998), for providing education to our nation's posterity, *e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), for regulating the professions which practice within their borders, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), and for maintaining public access roads. *See United Air Lines v. Mahin*, 410 U.S. 623, 630 (1973).

This Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council*, 515 U.S. at 586. When a federal court is allowed to hear a state tax matter,

> state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). *Cf. McKesson Corp. v. Div. of Alcoholic Bev.*, 469 U.S. 18, 38 & n.19 (1990). "Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Perez*, 401 U.S. at 128 n.17. *Compare* 49 U.S.C. § 11501(c) ("The burden of proof in determining assessed value and true market value is governed by State law"); *id.* § 14502(c)(3) (same).

In short, "[t]he federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary," *Arkansas v. Farm Credit Services*, 520 U.S. at 826, especially since the interests of the States in the integrity of their tax processes is of "particular moment." *Id.*

This Court should grant certiorari to resolve whether Congress validly abrogated the States' sovereign immunity concerning the paramount power of political existence or if it dangerously skewed "the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S. at 757. *Cf. Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (certiorari granted on tax question "because of the importance to the new State of Alaska").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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In The
Supreme Court of the United States

EARL ATWOOD, in his official capacity as Director, Wyoming Department of Revenue, and SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Petitioners,

vs.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY OF PETITIONERS

In their Petition, Petitioners have demonstrated that the criteria for granting certiorari that are set forth in Rule 10 of the Rules of this Court are met because this case raises a recurring issue of nationwide importance, the Tenth Circuit's holding is inconsistent with the decisions of this Court and other circuit courts, and there is a disagreement among courts as to whether the abrogation of Eleventh Amendment immunity in the Railroad Revitalization and Regulatory Reform Act (4-R Act) is a valid exercise of congressional power to enforce the Fourteenth Amendment. In their briefs in opposition, the Respondents make essentially two claims. Their first claim is that the *Ex Parte Young* doctrine obviates the need to resolve whether the abrogation of State sovereign immunity in the 4-R Act is a valid exercise of Congress's power to enforce the Fourteenth Amendment. Their second claim is that the 4-R Act was enacted to enforce the Fourteenth Amendment. Because both of these claims are unfounded for the reasons set forth below, the Court should grant the petition for writ of certiorari.

I. THE *EX PARTE YOUNG* DOCTRINE DOES NOT OBVIATE THE NEED TO RESOLVE WHETHER THE ABROGATION OF STATE SOVEREIGN IMMUNITY IN THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT IS A VALID EXERCISE OF CONGRESS'S POWER TO ENFORCE THE FOURTEENTH AMENDMENT

In their briefs opposing certiorari, Respondents argue that the *Ex Parte Young* doctrine provides jurisdiction over a claim against state officials brought under the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. § 11501. R.R. Br. In Opp. 5-9; U.S. Br. In Opp. 6, 12-14, both citing *Ex Parte Young*, 209 U.S. 123 (1908). But neither the Court of Appeals nor the District Court

decided the instant case on the basis of the *Ex Parte Young* doctrine. Moreover, States have compelling arguments that the *Ex Parte Young* doctrine is not available under the 4-R Act. If this Court does not decide the constitutionality of the 4-R Act's abrogation of Eleventh Amendment immunity, however, States will not be able to pursue these arguments because disposition of cases by courts of appeals on the grounds that the abrogation is constitutional will continue to result in the courts of appeals not reaching or deciding the *Ex Parte Young* question.

Respondents claim that the *Ex Parte Young* doctrine provides jurisdiction over a claim against State officials whenever the claim alleges an ongoing violation of federal law and seeks only prospective, injunctive relief. R.R. Br. 5-7; U.S. Br. 6, 12-14. But to interpret *Ex Parte Young* to permit a federal court-action to proceed in every such case would be to undermine the principle that the Eleventh Amendment represents a real limitation on a federal court's jurisdiction. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Some interests are therefore so essential to the principle of State sovereignty, that the *Ex Parte Young* exception to the Eleventh Amendment is not available in suits respecting them. *Coeur d'Alene*, 521 U.S. at 281-288.

"It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Dows v. City of Chicago*, 78 U.S. 108, 110 (1870). "Taxes being the sole means by which sovereignties can maintain their existence," *Bank of Commerce v. Tennessee*, 161 U.S. 134, 146 (1896), "the power of taxing . . . is essential to the very existence of government." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819). The taxation authority of state government is therefore "central to state sovereignty". *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994). Thus, the States' power to tax implicates interests essential to sovereignty. *ANR Pipeline Co. v. Lafaver*, 150 F.3d

1178, 1193 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999); *Neinast v. Texas*, 217 F.3d 275, 282 (5th Cir. 2000).

In accordance with these principles, the very Court of Appeals in which the instant case arises, the U.S. Court of Appeals for the Tenth Circuit, has already held that the power to tax is essential to State sovereignty because it would be impossible for a State to exist without the power to tax:

> [A] state's interests in the integrity of its property tax system lies at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership of land, cf. *Coeur d'Alene Tribe,* 117 S.Ct. at 2041, it is impossible to imagine that a state government could continue to exist without the power to tax.

ANR Pipeline, 150 F.3d at 1193.[1]

Accordingly, that court has already ruled that a plaintiff's challenge to a State's tax code is "a major intrusion into [the State's] special sovereignty interest" and that therefore "[t]he Eleventh Amendment stands as a barrier to such a request." *ANR Pipeline*, 150 F.3d at 1194 (10th Cir.). Thus, a decision by this Court on the issue of whether the abrogation of Eleventh Amendment immunity contained in the 4-R Act is a valid exercise of Congress's power to enforce the Fourteenth Amendment cannot be dismissed as a mere academic exercise and could well prove dispositive of the instant litigation.

Respondents' claims regarding the *Ex Parte Young* doctrine are disproven by the very recent decision upon which they rely, *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S.Ct. 1753, 70 U.S.L.W.

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[1] The *ANR Pipeline* case concerned a claim by utilities that federal equal protection entitled them to the benefits of the 4-R Act, rather than a claim by railroads that a particular tax against railroads violated the 4-R Act.

4432, 2002 WL 1008485 (U.S. May 20, 2002). R.R. Br. In Opp. 5-9; U.S. Br. In Opp. 12-14. In that decision, the Court noted that where Congress defines and limits the duty imposed by a statute and establishes a specific means to enforce that duty by legislating a "detailed remedial scheme," there is no jurisdiction under *Ex Parte Young*. *Verizon*, *supra*, citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Accordingly, the Respondents' claim that the *Ex Parte Young* doctrine provides jurisdiction over a claim against State officials whenever the claim alleges an ongoing violation of federal law and seeks only prospective, injunctive relief is not correct. Moreover, *Verizon* did not overrule *Coeur D'Alene*; *Verizon* did not deal with whether the interest implicated in *Verizon*, utility ratemaking, concerned an interest essential to sovereignty. In fact, the *Verizon* decision did not even address the Eleventh Amendment's preclusion of the application of the *Ex Parte Young* doctrine to suits implicating interests essential to sovereignty.

Finally, the Railroad Respondents argue that Congress "already considered and dealt with the concept of comity" in enacting the 4-R Act and therefore intended to confer *Ex Parte Young* jurisdiction over 4-R Act claims. R.R. Br. In Opp. 8-9 citing *Burlington Northern R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 464 (U.S. 1987). However, the principle of comity is not coextensive with the principle of sovereign immunity. After all, Congress can overcome a comity barrier to jurisdiction by mere legislation, but cannot overcome a constitutional barrier to jurisdiction like the Eleventh Amendment. *Couer D'Alene* was premised on constitutional grounds not considered in *Oklahoma Tax Commission*, a case which predated both *Coeur D'Alene* and *Seminole*. For this reason, Respondents' constitutional avoidance argument fails. R.R. Br. In Opp. 9; *see* U.S. Br. In Opp. 14. The doctrine holding that States are immune from *Ex Parte Young* actions implicating

interests essential to sovereignty *is* constitutional; it derives from the Eleventh Amendment. *Coeur d'Alene*, 521 U.S. at 267-288.[2]

II. THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT WAS NOT ENACTED TO ENFORCE THE FOURTEENTH AMENDMENT BECAUSE CONGRESS PASSED THE ACT FOR THE VERY PURPOSE OF PROHIBITING PRECISELY WHAT THE FOURTEENTH AMENDMENT PERMITS

The Respondents contend that certiorari should be denied because the 4-R Act meets the requirements for rendering abrogation of Eleventh Amendment immunity constitutional under the Fourteenth Amendment. R.R. Br. in Opp. 11-17; U.S. Br. in Opp. 6-12. As demonstrated in the Petition, however, Congress failed to satisfy the two main predicates for valid Fourteenth Amendment legislation, *viz.*, a pattern of activity by the States that violates the Fourteenth Amendment and a remedy that is a congruent and proportionate response to that conduct. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). It is true, of course, that the 4-R Act prohibits States from discriminating against railroads. But this point, emphasized especially by the Railroad Respondents (Br. in Opp. 11-17), begs the question whether it was unconstitutional State conduct that the 4-R Act was

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[2] The one Court of Appeals to reach the *Ex Parte Young* issue in the context of the 4-R Act did not address the issue of whether the *Coeur D'Alene* doctrine precluded such jurisdiction. *CSX Transportation Co. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied, sub nomine West Virginia Board of Public Works v. CSX Transportation, Inc.*, 525 U.S. 821 (1998).

designed to combat. The legislative history and the record before Congress shows it was not.

In arguing to the contrary, Respondents cite cases in which courts ruled that States had violated the Fourteenth Amendment by failing to apply their own laws equally with respect to the taxation of railroads. R.R. Br. in Opp. 15; U.S. Br. in Opp. 9. That showing is inadequate for two reasons. ***First***, the legislative history establishes that Congress passed the 4-R Act to address a distinctly different State activity, one that is subject to mere rationale basis review – States' enactment of laws that permit railroads to be treated differently, such as by separately classifying railroad property. ***Second***, the cases cited by Respondents and before Congress were utterly insufficient in number to justify, under the Fourteenth Amendment, the sweeping nationwide rule embodied in the 4-R Act.

1. The motivation underlying enactment of the 4-R Act can be seen most clearly in the Senate Report. After observing that several federal district courts had "voided discriminatory tax assessments and levies on common carrier property to the extent such practices were in conflict with applicable State laws or constitutional provisions," the Report went on to describe that the situation that necessitated congressional action was treating railroads differently than other classes of taxpayers and that such action was necessary precisely because the Fourteenth Amendment permitted such treatment:

> [T]hese decisions do not reach the situation in which State or local authorities levy discriminatory assessments or tax rates against common carriers, where the express provisions of State law or a State constitution permit such discriminatory treatment. This is most often accomplished by classifying carrier property in a separate class from other taxable property in the same district, a practice which the Supreme Court allowed in *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362 (1940),

> against a claim that such classification is violative of the "equal protection" clause of the 14th amendment.

S. Rep. No. 91-630 (1969) at 7.

Hence, while the Railroad Respondents (Br. in Opp. 14 n.12) are correct that the Senate Report cited *Louisville & Nashville R.R. Co. v. Public Service Commission of Tennessee*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968) (State violated Equal Protection Clause by failing to apply State's own law placing property in the same class for purposes of taxation), the Report did so when describing the specific issue it was *not* seeking to address.

Nor is there any merit to the Railroads' contention (Br. in Opp. 14) that, when the Senate Report was written in 1969, no State in the nation had a classification system. First, that assertion is flatly contradicted by the Senate Report's statement (noted above) that discriminatory tax treatment of common carriers was "most often accomplished by classifying carrier property in a separate class from other taxable property in the same district." S. Rep. 91-630, at 7 (1969). Moreover, this Court's decisions predating Congress' consideration of the 4-R Act not only prove that States had been classifying railroads differently from other taxpayers, but that doing so did not violate the Equal Protection Clause. *See, e.g.*, *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 368-69 (1940); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578-87 (1938); *New York & N.E.R. Co. v. Bristol*, 151 U.S. 556 (1894); *Ohio Tax Cases*, 232 U.S. 576 (1914).

When the 4-R Act is understood in this light, the Respondents' reliance (R.R. Br. in Opp. 15; U.S. Br. in Opp. 8-9) on *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), and *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989), can be easily rebutted. Even apart from the simple fact that the 4-R Act was originally enacted in 1976, years before either one of those decisions,

neither of them concerned the issues that prompted the enactment of the 4-R Act. *Ward* concerned whether discrimination by States between domestic and foreign corporations violates the Equal Protection Clause. 470 U.S. at 871-883. The discrimination to which the 4-R Act is addressed, however, is not between domestic and foreign corporations, but rather between railroads and non-railroads where such discrimination is permitted by State law (and hence subject to rational basis review).[3]

Similarly, *Webster County* concerned whether the Equal Protection Clause prohibits subjecting one to taxes not imposed on others of the same class. 488 U.S. at 338-346. There is no evidence, however, that taxing some members of the railroad class differently than other members of the railroad class was the concern that prompted the passage of the 4-R Act. To the contrary, the legislative history leaves no doubt that the 4-R Act was passed because the class of railroads was being taxed differently than other classes (per State law), and because such taxation was constitutional under the Equal Protection Clause. S. Rep. No. 91-630 (1969).

The Railroad Respondents also cite (Br. in Opp. 13-14 n.11) *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923), and *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907), for their claim that Congress enacted the 4-R Act to enforce the Equal Protection Clause. But not only is the legislative history barren of any reference to those two cases, they both concerned situations where a State's alleged failure to follow its own laws was claimed to have violated the Equal Protection Clause. *Sioux City Bridge Co.*, 260 U.S. at 446; *Raymond*, 207 U.S. at 37. As noted above, that was precisely the type of situation that did *not*

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[3] For the same reason, Respondents' citation to *Southern Ry. Co. v. Greene*, 216 U.S. 400 (1910), is unavailing. That case, like *Ward*, concerned discrimination by States against foreign corporations. Moreover, it does not appear that the case appears anywhere in the legislative history.

motivate enactment of the 4-R Act. Moreover, *Sioux City Bridge Co.* concerned whether treatment of a particular taxpayer violates the Equal Protection Clause, which is a different issue than whether treatment of an entire class of taxpayers violates that Clause. *Nashville*, 310 U.S. at 367-368.

2. Even were one to assume, *arguendo*, that the 4-R Act was enacted to combat the States' failure to apply their own laws equally (and thereby disadvantage railroads), the legislative history "simply fails to show that Congress did in fact identify a pattern of," *Garrett*, 531 U.S. at 368, unconstitutional State conduct. Respondents have cited merely three decisions of this Court in which discriminatory State taxation of railroads was found to be unconstitutional – all of which were decided more than 50 years prior to enactment of the 4-R Act. On top of that, Respondents add two lower court cases (*Public Service Commission of Tennessee*, *supra*, and *People v. Belt Ry. Co. of Chicago*, 226 N.E.2d 265 (Ill. 1967)). That assemblage of cases is a far cry from the predicate demanded by this Court for the enactment of valid Fourteenth Amendment legislation. *See Garrett*, 531 U.S. at 368-374; *Kimel*, 528 U.S. at 82-91.

3. Given the absence of a predicate showing a pattern of unconstitutional State conduct, the 4-R Act is grossly disproportionate "enforcement" legislation. The Railroad Respondents nevertheless insist (Br. in Opp. 16) that it would be "difficult to imagine a more tailored or limited response" to States violating the Fourteenth Amendment by discriminating against railroads in taxation. In support of this assertion, they observe (Br. in Opp. 12, 16-17) that the 4-R Act targets only States, prohibits only the portion of the tax that is discriminatory, and prohibits only a portion of practices that violate the Fourteenth Amendment.

But it does not take much imagination to tailor and limit a prohibition against States discriminating against railroads in taxation by prohibiting such discrimination

only where doing so does not redefine the right of equal protection guaranteed by the Fourteenth Amendment. Nor does it take much imagination to tailor and limit a prohibition against States discriminating against railroads in taxation where the discriminating has no rational basis and serves no legitimate purpose.

CONCLUSION

For all the reasons set forth above, the petition for writ of certiorari, and the Brief of the States of West Virginia, *et al.*, Amicus Curiae in Support of the Petition for Writ of Certiorari, the Court should grant the petition for a writ of certiorari.

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